KING COUNTY PROSECUTING ATTORNEY'S OFFICE

DANIEL T. SATTERBERG
PROSECUTING ATTORNEY

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To Whom It May Concern:

This letter is meant to briefly summarize some of my concerns regarding the proposed changes to the criminal rules for superior court. These concerns are based on my experience as a prosecutor for 12 years, with half of that time being spent prosecuting Domestic Violence and Sexual Assault cases. In the interest of time, this letter cannot cover every concern I have regarding the rule changes. Although I support the spirit behind some of these rule changes, I think the rules themselves are overbroad, with unintended consequences. This email summarizes some of my biggest concerns, and I agree with many of the other concerns raised by victim advocates, prosecutors, and police.

CrR 3.7
Although I recognize that some police agencies are adopting body-worn video cameras, many police agencies are not equipped to conduct audiovisual recording of encounters—particularly encounters outside of a police station. We already worry about whether criminal law is applied equally across the state. The implementation of this rule may further the divide by making it more difficult to prosecute cases occurring in under-funded jurisdictions. It is not fair to the victims who live in those communities that their crimes would be less-enforceable than crimes occurring in wealthier jurisdictions.

Even when audiovisual recording is possible, this rule is extremely broad in its application. Field investigations are fluid, and a casual contact with someone initially seen as a witness can later be said to be an interrogation of a suspect. As a result, this rule could result in the suppression of otherwise-reliable, constitutionally-valid evidence.

This rule requires a high level of corroboration for a subset of evidence presented at trial. The rule seems premised on the belief that all police officers are not credible. In fact, it codifies such a presumption. Such a rule is not necessary, as jurors are instructed to evaluate the credibility of all witnesses and lawyers are skilled at questioning witnesses to draw out issues of credibility.

Finally, this rule is not limited to police, and it could be applied to anyone questioning someone in a way that could be characterized as "interrogation."

CrR 3.8
Even if recording identification procedures is ideal, it should not be absolutely tied to the admission of such evidence. I regularly see witnesses who are concerned about being recorded. Witnesses may fear retaliation, and a recorded procedure triggers that fear. Witnesses may have been victims of prior abuse, for which the act of being recorded causes trauma (specifically prior victims of stalking or voyeurism). Finally, victims of violent crimes often feel as if they've lost

control of their lives as a result of the crime—giving them no choice when it comes to recording further removes their ability to re-assert any control in their lives.

CrR 3.9
Trial courts have the guidelines they need to determine whether an in-court identification is admissible. Attorneys have effective tools for questioning the validity of in-court identifications. This rule is overly-restrictive. Investigating officer should be able to use their training and experience to determine when an out-of-court identification procedure is necessary, without worrying about how it affects an in-court identification.

This rule is also overly-broad. It would apply to situations where an out-of-court identification is not necessary or practical. For example, the rule appears to apply to an officer conducting a traffic stop—even if he verifies the driver's identity via a driver's license. A second example would be a rape victim, whose assailant was identified by DNA, but who was too traumatized to view a montage. A jury would be confused if the victim was never asked if she recognized her attacker in the courtroom (even if the answer was, "no"). In my experience, jurors would certainly wonder why she was not asked to identify her rapist, and would not understand that such a question was forbidden.

CrR 4.7
Subsection (a) does not simply codify the requirements of Brady, but rather greatly increases the State's discovery obligation while applying vague standards to guide that process (what does it mean when evidence "tends to impeach?"). It also imposes a burden of tracking an unwieldy range of evidence post-conviction (significantly broader than RPC 3.8(g)).

As someone who works with DV and sexual assault victims, subsection (h) is particularly concerning, both because it allows distribution of redacted discovery without the prosecutor/court's knowledge and because the list of items that must be redacted is insufficient. Although I do not believe they make mistakes intentionally, defense attorneys sometimes make mistakes in applying redactions. As the party working with most of the witnesses and victims, prosecutors have a vested interested in ensuring that redactions are made correctly. They serve as a gate-keeper to make sure that mistakes are not made. Skipping that step ensures an increase in mistakes, without any consequences for careless redactions.

The list of required redactions is also entirely too narrow. Under the proposed rule change, the following information would be provided to defendants without redaction: all contact information, school and work locations, medical records, CPS records, photographs (regardless of the subject matter), and explicit materials. Many victims and witnesses would be afraid of such unregulated distribution of their information, including sexual assault victim, stalking victims, and witnesses to gang-related crimes. Such distribution would unduly impact their privacy (more than is ordinarily involved with being a witness) and could be used to threaten their safety or encourage retaliation.

CrR 4.11
For many reasons, I prefer to have witness interviews recorded and encourage witnesses to agree to recording. In my practice, the majority of witnesses do agree to record the interviews after being asked for consent to a recording. However, witnesses and victims have a number of valid reasons for not wanting to have interviews recorded. Discussing these reasons may be highly

prejudicial to a defendant and/or the witness, while having nothing to do with the credibility of a witness. Furthermore, this rule punishes witnesses for exercising their long-held statutory right to refuse being recorded.

Again, this letter is not intended to cover all of my thoughts, but to highlight some of the issues that are most concerning given my practice. Thank you for considering my concerns.

Regards,

Bridgette Maryman
Senior Deputy Prosecuting Attorney

Tracy, Mary

From: OFFICE RECEPTIONIST, CLERK
Sent: Tuesday, April 30, 2019 4:56 PM
To: Tracy, Mary
Subject: FW: comments on proposed changes to criminal rules
Attachments: Letter on rule amendments.docx

From: Maryman, Bridgette [mailto:Bridgette.Maryman@kingcounty.gov]
Sent: Tuesday, April 30, 2019 4:55 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Subject: comments on proposed changes to criminal rules

Please find the attached letter in response to the proposed rule changes.

Regards,
Bridgette

Bridgette Maryman
Senior Deputy Prosecuting Attorney, Domestic Violence Unit
Phone: 206-477-1193