Tracy, Mary

From: OFFICE RECEPTIONIST, CLERK
Sent: Tuesday, March 19, 2019 2:04 PM
To: Tracy, Mary
Subject: FW: proposed new rule changes to 3.7-4.11

And another one...

From: Christy Smith [mailto:csmith@ruralresources.org]
Sent: Tuesday, March 19, 2019 2:00 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Cc: Alex Panagotacos <alexp@ruralresources.org>
Subject: proposed new rule changes to 3.7-4.11

Good afternoon,

Thank you for taking the time to review my comments and concerns with the new proposed rule changes to 3.7-4.11 brought forth by the defense bar. I have outline the rule change first then followed each rule with, "concern among many:" followed by my concerns for the rule changes.
The fact finder is the sole judge of credibility. 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.

CrR 3.7 RECORDING INTERROGATIONS suggested new rule

Custodial and non-custodial interrogations of persons under investigation for any crime are to be audiovisually recorded, by electronic or digital device.

Concern among many: **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. I am from rural jurisdictions where this would negatively impact our law enforcement officers.

Exceptions. State has the burden of proof that an exception applies by a preponderance.

Spontaneous statement not in response to question.
Prior to the statement, the person refuses recording, and *that* is electronically recorded.

Concern among many: The requirement that a refusal be recorded violates the subject's rights under the Washington Privacy Act right not to be recorded.

Consequences. If a court finds a violation of the rule by a preponderance, any statement during or following that interrogation, even if it otherwise complies with this rule, is presumed inadmissible in any criminal proceeding against the person, except for impeachment. The presumption may be overcome by clear and convincing evidence that the statement was voluntarily given and is reliable, based on the totality of the circumstances.

Concern among many: **This rule will keep relevant and sometimes critical evidence from the jury when there is no question that a statement was voluntarily given.**

Preservation. Recordings must be preserved until conviction is final and all direct and habeas appeals are exhausted, or until prosecution is barred by law. "In all Class A felonies" must be preserved for 99 years.

Concern among many: As to all crimes that could be prosecuted as a Class A felony (including all deaths and most sex crimes), all interrogations must be preserved for 99 years, even if it is concluded that a death was suicide, or a defendant confesses, is prosecuted and dies. This mass of recordings would be available to the public.

CrR 3.8 RECORDING EYEWITNESS IDENTIFICATION PROCEDURE

suggested new rule

(a) Out-of-court i.d. procedure resulting from a photo array, live lineup, or show-up by law enforcement shall not be admissible unless a record of the i.d. procedure is made. Video is directed; video or audio recording is required if possible.

Concern among many: 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.

(a) **Documenting the procedure**.

All identification procedures and related interviews with any V/W should be fully documented. Video-recording when practicable, audio recording is the preferred alternative. If neither video- nor audio-recording is possible, administrators should produce a detailed written report of the interview or identification procedure immediately following completion.

Concern among many: What "is possible" is a standard that is impossible to interpret. Does it allow an exception for exigent circumstances, lack of equipment, or community safety?

(a) **Contents.** Record to include details of what occurred, including: (1) place; (2) dialogue between W & officer who administered; (3) results; (4) if live lineup, photo of lineup; if procedure includes movements, video; if procedure includes speaking, audio recording of the speaking and a photo of the i.d. procedure; (5) if photo lineup, the photo array, mug books or digital photos used, including an unaltered, accurate copy of the photos used, and an accurate copy upon which W indicated his or her selection; (6) identity of persons who witnessed the live lineup, photo lineup, or showup, including location of Ws and whether Ws could be seen by W making i.d.; (7) Identity of any individuals with whom

the W has spoken about the i.d., at any time before, during, or immediately after the official i.d. procedure, & a detailed summary of what was said, including identification of law enforcement and private actors.

Concern among many: (c)(7) It is an impossible burden to require law enforcement to document any private persons with whom the witness has discussed the suspect's identity before the identification procedure, which could occur days, weeks or years after the crime. How would law enforcement know? What if the witness doesn't recall, or doesn't want to identify everyone who he/she has spoken to, or lies?

(a) **Remedy**[numbered (c) in rule]: If the record prepared is lacking important details as to what occurred, and it was feasible to obtain and preserve those details, the court may, in its sound discretion and consistent with appropriate case law, declare the identification inadmissible, redact portions of identification testimony, admit expert testimony, and/or fashion an appropriate jury instruction to be used in evaluating the reliability of the i.d..

Concern among many: **The rule invites a court to craft a jury instruction "to be used in evaluating the reliability of the identification," which invites a comment on the evidence without giving any real direction to the trial court.** Judicial comments on the evidence are unconstitutional in Washington.

CrR 3.9 IN-COURT EYEWITNESS IDENTIFICATION

suggested new rule

In-court identifications are inadmissible where the perpetrator is unknown to the witness and there has been no prior out-of-court eyewitness identification procedure.

Concern among many: **This new rule apparently would apply to law enforcement witnesses, which would preclude prosecution of most traffic-related crimes (from DUI to vehicular homicide) unless the officer was previously acquainted with the defendant or was presented with a photographic montage – or perhaps the officer could do his or her own show-up?**

CrR 4.7 DISCOVERY

amendments

Prosecutor's obligations:

(2) Shall disclose to the defendant:

[new] All records, including notes, reports, and electronic recordings re: all identification procedures, whether or not the procedure resulted in an identification or resulted in i.d. of a person other than the suspect.

Shall disclose any info that tends to negate Δ's guilt as to offense charged, [new] and/or which tends to impeach a State's witness.

Concern among many: This provision purports to codify the requirements of Brady v. Maryland, but that case is limited to information that is material. Without that limitation, the proposed additional obligation to disclose any information that "tends to impeach" is unreasonably burdensome and unwarranted.

(4) Prosecutor's obligation under this section ~~is limited to material and info within the knowledge, possession or control of members of the prosecuting attorney's staff.~~ includes material and evidence favorable to the defendant and material to the defendant's guilt or punishment, and/or which tends to impeach a State's witness. 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.**

Concern among many: 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.

Regulation of discovery.

Defense counsel may provide discovery to the defendant without a prosecutor's or court knowledge or approval. The only redactions required before providing it are: various account/ i.d. numbers; DOB redacted to the year only; names of minors redacted to initials; home addressed redacted except for city and state.

Concern among many: 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.

CrR 4.11 RECORDING WITNESS INTERVIEW

suggested new rule

(a) **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. Interviews are subject to court's regulation of discovery under CrR 4.7(h). Any disputes about the interview or manner of recording shall be resolved in accordance with CrR 4.6(b) and (c) [depositions] and CrR 4.7(h). This rule shall not affect any other legal rights of witnesses.

Concern among many: 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.

(a) **Providing Copies.** Copies of recordings and transcripts, if made, shall be provided to all other parties in accordance with the requirements of CrR 4.7. If recorded by a court reporter and discoverable under CrR 4.7, any party or the witness may order a transcript at the party's or witness's expense.

Dissemination of recordings or transcripts of witness interviews obtained is prohibited except where required to satisfy discovery obligations of CrR 4.7, pursuant to court order after a showing of good cause relating solely to the criminal case at issue, or **as reasonably necessary to conduct a party's case.**

Concern among many: The rule allows unrestricted disclosure of a recording of a witness interview to the defendant or associates of the defendant if defense counsel decides it is reasonably necessary to the defense. This is an invasion of privacy and creates a risk to public safety, where the questions that may be asked during an interview are virtually unlimited, and may include personal questions on subjects that are inadmissible at trial. That risk is unfairly imposed when the witness is being coerced to agree to recording by the provisions of this rule.

(a) **Preliminary Statement.** At the start, person conducting the interview must confirm on the recording that witness has been provided: (1) name, address, and phone number of person conducting interview; (2) identity of party represented by person conducting interview; and (3) that witness may obtain a copy of recording and transcript, if made.

Concern among many: The proposed rule **does not require that victims or witnesses be informed of their option to refuse to consent to the recording of an interview. The interviewer may accurately assert that he has the "right" to record the interview, which will mislead the witness.**

(a) **Witness Consent.** A witness **may refuse** to be recorded. If the witness refuses and there is a dispute regarding any statement made by the witness, the **jury should be instructed to examine the statement carefully in the light of any reasons for the refusal and other circumstances relevant to that witness's testimony, including, but not limited to, bias and motive**.

Concern among many: **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.**

The above comments were referenced by Ben Santos who is a Senior Deputy Prosecuting Attorney in the King County Prosecutor's Office. Thank you for your time and consideration on these rule changes. Take care.

Thank you and have a great day,

Christy Smith

CAC Program Manager

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