Tracy, Mary

From: OFFICE RECEPTIONIST, CLERK
Sent: Tuesday, April 30, 2019 8:04 AM
To: Tracy, Mary
Subject: FW: Comments on proposed court rules - 3.7, 3.8, 3.9, 4.7, and 4.11

From: Adams, Danika [mailto:Danika.Adams@kingcounty.gov]
Sent: Monday, April 29, 2019 8:20 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Subject: Comments on proposed court rules - 3.7, 3.8, 3.9, 4.7, and 4.11

I am writing to provide comments to the members of the Supreme Court regarding the proposed amendments to CrR and CrRLJ 4.7, and the proposed new rules CrR and CrRLJ 3.7, 3.8, 3.9, and 4.11.

I have been a criminal prosecutor for 12 years and practicing in the Economic Crimes Unit for the past 3 years. If adopted, these proposals would prevent law enforcement from effectively investigating crimes. That it turn would damage the community's faith that law enforcement and prosecutors will hold (or will be able to hold) defendants accountable. These proposals are clearly targeted to prevent relevant, reliable evidence from ever getting to a fact-finder. The text here vilifies crime victims and witnesses – as well as members of law-enforcement – by presupposing they are unreliable or lying. Please see below for the specific reasons I am objecting to each rule.

I urge the members of the Supreme Court to reject these proposed rules and amendments.

Regards,

Danika Adams
Deputy Prosecuting Attorney, Economic Crimes Unit
King County Prosecuting Attorney's Office

Comments opposing CrR/CrRLJ 3.7

- Requiring "audiovisual" recording of any questioning of "persons under investigation for any crime" is a technical nightmare. Not all law enforcement have access to video cameras in the field, or in their precincts. Law enforcement would be put in position where they could no longer ask questions of anyone unless there was a camera recording them, because if the questioning began as questioning of a witness, and that witness became a suspect during the questioning, all of the statements would be excluded. There are also places where recording is not allowed or is discouraged (e.g. hospitals, schools, private homes) – crimes could essentially not be investigated in those locations at all.
- The Privacy Act prohibits the recording of someone who does not want to be recorded – however such a recording is required under this rule to access the refusal exception.
- Why are law enforcement less qualified to give credible testimony about otherwise admissible out-of-court statements than other witnesses are? Or does this apply to "interrogations" by civilians as well – supervisors investigating employee thefts, witnesses/victims asking questions of the person they believe committed a crime? For eons, witnesses have taken the stand, under oath, and testified about statements that defendants made to them – are we now going to presume that ALL witnesses are lying?
- What basis is there to take away from fact-finders of their ability to make credibility determinations?
- CrR 3.5 requires proof by a preponderance that the Constitution is satisfied regarding statements by a Defendant. This rule proposes an even higher standard to overcome the presumption of inadmissibility of a non-recorded statement.

Comments opposing CrR/CrRLJ 3.8

- This proposes some great best-practices for identification procedures, many of which are already in use in most law enforcement agencies, but requiring it all cases and circumstances would impede criminal investigations.
- Time is of the essence in a show-up procedure. If the subject is NOT identified, he or she should be released with all due speed, so that the investigation can proceed looking for the correct suspect. Instead, Terry detention would be prolonged while recording equipment was located and setup. The shot would have to be framed just right, so that no "important details" were missing from view. The microphones would have to be positioned carefully to ensure that no answers were obscured by over-talking, or mumbling, or crying. Officers would have to locate EVERY person with a view of the scene of the show-up (whether on the street, in a building, or in a passing car), to identify them.
- There are no standards for the court to apply in determining what are "important details" and what was "feasible" during the investigation.

Comments opposing CrR/CrRLJ 3.9

- I regularly put victims and witnesses on the stand to testify months or years after a crime and ask them whether they recognize anyone in the courtroom from that incident. For civilian witnesses, they often candidly say that they do not – it was too long ago – they did not get a good look – they just cannot be sure. They may even do this sheepishly, because everyone in the courtroom can see who the Defendant is, but they are trying to make their testimony as honest as possible. This rule offensively presupposes that all eyewitnesses are liars.
- Will law-enforcement witnesses also be subject to out-of-court identification procedures before they will be permitted to make an in-court identification?
- Out-of-court identification procedures are intended to occur as close in time as possible to the crime. This rule forces investigators to conduct an untimely out-of-court identification procedure (and risk tainting the testimony of a witness) or else forever lose the ability to present an in-court identification. This is contrary to best practices, and case-law and Constitutional standards.

Comments opposing amendments to CrR/CrRLJ 4.7

- Proposed changes "to bring the rule into accord with Brady v. Maryland" actually expands the rule substantially beyond Brady. The State can absolutely be held to account for failure to disclose material, but it is impossible for the State to provide material in the custody of others (outside of the Prosecutor's Office and law enforcement working on the case) and entirely unknown to the State.
- [Regarding (3) information … which tends to impeach a State's witness] In order to comply with this rule, the State would have to launch investigations into every witness named in discovery and determine if there is any possible basis – even if not material to the case – that the witness could be impeached. Given the ongoing nature of the Prosecutor's obligations, the proposal appears to require the State to continue investigating every witness in every case for an unlimited period of time in the future.
- Regarding redactions of discovery
    - Under the current rule, I regularly review proposed redactions by defense counsel, so I speak with experience when I say: defense attorneys are terrible at making thorough and correct redactions. It is understandable, since they have zero motivation to make sure they catch every instance with no mistakes.
    - This rule completely ignores major categories of redaction: names of adult witnesses and victims; email addresses and online screen-names of witnesses and victims; employer and school names/addresses of witnesses and victims; phone records of witnesses and victims; medical records; photographs; VIN numbers; serial numbers; autopsy reports.
    - It also makes the error of making a hard-and-fast rule that is not useful in certain cases. In many of my financial fraud and Identity Theft cases, phone numbers, SSNs, account numbers, DOL

numbers, and passport numbers are essential evidence. If they are fully redacted, or redacted to a mandatory portion (i.e. last four), it might complete negate the reasons for providing discovery.
  - Proposed redactions need to continue to pass through the hands of the Prosecutor's Office, where the incentive to protect victims and witnesses is strongest, and where discretion can be applied to make the disclosure meaningful.
  - It is not clear what is included in (or excluded from) "Financial Accounting Information"?
  - There is no consideration given to jail limitations on what material can be in the possessing of in-custody defendants, which can have criminal implications.

Comments opposing CrR/CrRLJ 4.11

- CrR 4.7 does not currently require defense counsel to provide copies of recordings of interviews to the State, so requiring counsel to provide copies "in accordance with the requirements of CrR 4.7" is meaningless.
- The rule is internally inconsistent -- saying both that counsel can openly record the interview (with no requirement for consent), but also that the witness can refuse to be recorded.
- Witnesses are not required to sit for interviews. State v. Vance, 184 Wn. App. 902, 912, 339 P.3d 245 (2014); State v. Wilson, 108 Wn. App 774, 779, 31 P.3d 43 (2001); State v. Mankin, 158 Wn. App. 111, 123-34, 241 P.3d 421 (2010). If the possibility of sitting for an interview means that a witness will be subject to being recorded without their consent, then many more witnesses will decline to be interviewed, and we will have costly and time-consuming depositions ordered in many more cases.
- The rule improperly punishes victims and witnesses for withholding consent to the recording by mandating an additional jury instruction that calls into question the victim's or witness's reasons for not wanting to be recorded. This flies the in the face of the right of victims and witnesses to be "treated with dignity, respect, courtesy, and sensitivity." RCW 7.69.010; See also Const. art. I, § 35.