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April 17, 2019

Clerk of the Supreme Court of the State of Washington
P.O. Box 40929
Olympia, WA 98504-0929

Re: Washington Association of Criminal Defense Lawyers Proposed Changes to the CrR 3.7, 3.8, 3.9, 4.7, and 4.11/CrRLJ 3.7, 3.8, 3.9, 4.7, and 4.11.

Dear Clerk of the Supreme Court

I am writing to voice my strong opposition to the adoption of the proposed changes to above-noted Criminal Court Rules for Washington State Superior Courts and Courts of Limited Jurisdiction. I am a senior deputy prosecutor with the King County Prosecuting Attorney's Office and have 32 years' experience working with and observing Washington's criminal rules. Generally, I am not opposed to thoughtful, fully vetted, necessary changes to the criminal rules. Regardless of what "side" of the adversarial process we find ourselves on, we should listen to the concerns of all affected by possible injustices created by a court rule and then engage in respectful and complete debate to ascertain what changes, if any, should be made. I see no such open and complete vetting as to these proposed rule changes. The proposed changes were submitted by the Washington Association of Criminal Defense Lawyers (WACDL), a group that clearly has an interest and a bias in what the rules require and prohibit. I see no public debate having occurred as to these proposed changes. I see no input from affected parties, such prosecutors, law enforcement, victims and their advocacy groups, prior to these rules being posted for comment. Likewise, apparently, no Washington State Bar committee nor Washington State Supreme Court convened working group has considered these rules. Most importantly, input from Washington State Superior Court and District Court judges, individuals who work with these rules daily as to hundreds of cases, is absent. Such sweeping changes as proposed by WACDL require thorough discussion by a commission comprised of all stakeholders, not simply vetting by internet website comment.

Review of the proposed rules changes reveals a clear bias towards the defense bar, based on an alluring and seductive narrative that does not rely upon the true scope of the implied problems. These proposed changes set, in many cases, unattainable or unworkable standards and requirements for law enforcement that will deprive fact-finders of credible and reliable evidence. These proposed changes ignore if not insult the role judges, who preside over CrR 3.5 and CrR 3.6 hearings daily in the trial courts of Washington, play in thoughtfully and carefully keeping inappropriately secured and/or unreliable evidence from the jury. These proposed changes provide undeserved benefits to criminal defendants yet place victims of crime at risk. On several occasions, they are outright poorly written, ill defined, internally inconsistent, contrary to law, or lead to absurd results. Considering how important the Criminal Rules are to the successful operation of criminal justice in the courts of the State of Washington, a much more thorough, thoughtful, careful, and inclusive review and composition of potential rules changes is required.

After reviewing each of the proposed changes, both by myself and then with a working group within my office, multiple problems with each of the proposed changes were found. I have attached a limited list of problems I find most troubling. Mindful of the importance of this reader's time, I am not including all noted problems with each rule.

I strongly urge this Court to reject these proposed rule changes. If the Court believes some of the concerns implicit in the proposed changes warrant investigation and consideration, I would ask that the Court initiate an open, thorough, and inclusive review by a Court appointed working group with representation of all stakeholders before any such changes are made.

Thank you for time and your consideration.

Sincerely

Donald J. Raz, WSBA #17287
Senior Deputy Prosecuting Attorney
King County Prosecuting Attorney's Office

Attachment to Letter of Donald Raz

Proposed changes to CrR 3.7

- Proposed CrR 3.7 will impede effective law enforcement because many individuals are reluctant 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.
- 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 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.
- Proposed CrR 3.7 is not limited to interrogations by law enforcement. Does it apply to retail security? Child/ Adult Protective Service employees? Any state employee or agent? Private citizens? Judges?
    - The requirement of "due diligence" in maintaining equipment is a substantial and unreasonable burden on police agencies and will result in extensive litigation over maintenance standards and procedures, what is due diligence in maintenance, maintenance records, and what is the necessary proof of maintenance.
    - The meaning of "substantial exigent circumstances" where a recording is not necessary is unclear. Would it include the scene of a traffic collision, if the suspect is in the hospital, if the suspect is at a facility with no video available, if an officer's determines that recording will impede a homicide investigation, or covert operations or knock-and-talk investigative procedures?
    - The remedy for violation of CrR 3.7, exclusion of the statement and all subsequent statements, is extreme and unnecessary.
    - 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.
    - It is an arbitrary and punitive choice to apply a standard of proof to overcome the presumption of inadmissibility that is a higher standard than applies to alleged constitutional violations.

Proposed changes to CrR 3.8

- 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.
- Section (c)(6) It is an unreasonable burden to have to document the identity of all persons who witness every procedure, especially as to a showup at or near a crime scene, where the people present are fluctuating, or individuals present may not be willing to identify themselves. Forcing the witness to look around to identify who they can see is watching will be intimidating to a frightened witness.
- Section (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?
- The remedies listed in CrR 3.8(d) are extreme and unreasonable
- The term "important details" is not defined and the rule does not specify who determines whether it was "feasible" to obtain or preserve those details.
- 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.
- The concept of redacting portions of identification testimony makes no sense. It provides no guidance to a trial court. Does it mean the jury will be deprived of information relevant to its determination?

Proposed changes to CrR 3.9

- Determination of whether an in-court identification procedure should be excluded is already adequately covered by case law – a more restrictive rule is unnecessary.
- 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?
- Proposed CrR 3.9 codifies an unsupported conclusion that in-court identifications are all unreliable.
- The rule would force an identification procedure in every case, including in cases where there is no question that the correct person has been charged (bloody, weapon-wielding man caught leaving victim's home), or in-court identification would not be permitted.
- The term "unknown" is unreasonably vague. Must the witness know the perpetrator's name or be socially acquainted? Is an unnamed stalker "unknown"? The lack of a clear standard will force law enforcement to conduct unnecessary identification procedures because of the possibility that the court will interpret the term broadly.
- The proposed rule does not make sense when the crime itself occurs over an extended period of time, allowing the witness a substantial opportunity to observe the perpetrator.
- If the court precludes an in-court identification under this rule, in the interest of truth, the jury must be informed that the court has prevented that, so that the jury will not draw any inferences against the prosecution based on the failure to do so.
- This prevents the jury from hearing relevant evidence. The weight of that evidence is properly developed through cross-examination and determined by the jury, not an arbitrary bright-line rule.

Proposed changes to CrR 4.7

- 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.
- 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.
- 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.
- 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.
- 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.
- The list of necessary redactions is obviously insufficient. 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. Further, 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.

Proposed changes to CrR 4.11

- 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 is 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 limitation on dissemination of recordings is inconsistent with the requirements of the Public Records Act, which will require disclosure upon request.
- The limitation on dissemination to the current case only unreasonably prohibits use of the transcript of an interview to impeach a witness in a different case, whether that case involves the same incident (an accomplice), a related incident, or a completely different case. For example, the statements of an expert witnesst.
- 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 and individual safety.
- 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.

Tracy, Mary

From: OFFICE RECEPTIONIST, CLERK
Sent: Wednesday, April 17, 2019 12:53 PM
To: Tracy, Mary
Subject: FW: Letter as to Proposed Changes to the Washington State Criminal Rules
Attachments: Letter to Supreme Court as to Proposed Changes to Select Criminal Rules.pdf

From: Raz, Don [mailto:Don.Raz@kingcounty.gov]
Sent: Wednesday, April 17, 2019 12:52 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Cc: Raz, Don <Don.Raz@kingcounty.gov>
Subject: Letter as to Proposed Changes to the Washington State Criminal Rules

Attention: Clerk of the Court

Attached please find my letter in regard to the proposed changes to CrR 3.7, 3.8, 3.9, 4.7, 4.11, and their CrRLJ counterparts.

Thank you for your consideration

Don Raz
Senior Deputy Prosecutor
King County Prosecuting Attorney's Office