Tracy, Mary

From: OFFICE RECEPTIONIST, CLERK
Sent: Thursday, July 12, 2018 3:23 PM
To: Tracy, Mary
Subject: FW: Comments on Suggested CrR 3.7

I think this comes to you. If not, let me know who and I'll send to them.

From: Brian Hultgrenn [mailto:Brian.Hultgrenn@co.benton.wa.us]
Sent: Thursday, July 12, 2018 3:19 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Subject: Comments on Suggested CrR 3.7

This is my personal commentary on the proposed rules. It does not reflect the official position of my office.

CrR 3.7

As a practical matter, for a prosecutor there are many positives to recording all interviews. In general, it more effective at trial to have an actual recording where a suspect cannot claim he or she was misquoted or misunderstood. However, this change undermines Wash. Rule 9.73.030. Recording someone requesting not to be recorded is still recording them. Some people don't want to be on audio record at all. Now an officer has to explain he needs them to go on record saying they don't want to be recorded. To a lay person, going on the record and stating you don't want to be recorded may sound like an admission of guilt. Recording their decision in audio, for posterity, seems like they are making some sort of major decision, as opposed to just exercising their right under Washington law. Imagine telling someone after they invoked Miranda that you needed a recording of them exercising their right, would a person not be suspicious about why exercising their constitutional right requires audio documentation?

Officers already are required to advise of Miranda rights. They advise juveniles of additional rights. They advise every one of the right not be recorded. Now the Court will impose an additional burden of forcing them to prove by preponderance of the evidence the interview should not have been recorded? I believe we have a system in place, under CrR 3.5, to determine whether statements are knowing and voluntary. This hearing can take into account whether a statement was recorded. There is no need to utilize and additional rule to insure statements are voluntary.

In all, I think negatives of this rule outweigh the positives.

CrR 3.8

This rule again undermines RCW 9.73.030, but for victims and witnesses, not for suspects. It also works to put additional stress on an already stressful situation. Imagine being transported to identify the person that assaulted you in the middle of night. This cannot be easy. Now add an additional element of video or audio recording. Knowing that what you say we be memorialized will make it more difficult. There is an entire segment of the population taught that talking to police at all is wrong, that it makes you a snitch and a target. You can deny a report summarizing your conversation, but you can't deny a recording. Victims of violence frequently verbally identify their attackers, but balk when asked to provide a written statement. When you place this type of additional requirements on police, you are putting additional requirements on victims. I believe the current state of the law already puts the rights of the accused far above the rights of victims. This rule just moves further in that direction.

The rest of the rule lists what are really a series of best practices for what to include in your report. I think this can be valuable, but every single element of a law enforcement investigation has best practices. You could draft a rule

requiring witnesses be separated for interviews because that is the best practice, but it is already done when practicable because it is the most effective way to do interviews. If police do not do it they are subject to cross examination at trial. A jury can understand this and take it into account. I do not think it needs to be codified by rule.

CrR 3.9

I think most criminal attorney would not risk this so it is going to have very narrow application. The problem is the "unknown to the witness" language. As in never saw them before the incident? That needs to be flushed out more. If an identification was never done, it was probably because they did know them in some way.

CrR 4.11

This rule goes a step further in undermining the rights of victims and witnesses. Not only does it encourage victims and witnesses not to exercise their rights under RCW 9.73.030, it penalizes them for doing so. The reason officers can't testify a defendant exercised their 5th amendment right is because it would erode that right. Knowing that, this rule deliberately chooses to undermine victim and witness rights. It erodes their right to not be recorded.

A victim has to have a certain amount of courage to report someone dangerous. This rule asks that they go on audio record so that a Defendant can then tell those he knows that he heard the person snitching on recording. There is no reason to subject a victim to this prior to trial.

If this rule is passed, witnesses who might otherwise agree to be interviewed, may refuse.

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