Tracy, Mary

From: OFFICE RECEPTIONIST, CLERK
Sent: Wednesday, May 1, 2019 8:24 AM
To: Tracy, Mary
Subject: FW: Comments on proposed new rules CrR 3.7, 3.8, 3.9, 4.7, and 4.11

From: Simmons, Jason [mailto:Jason.Simmons@kingcounty.gov]
Sent: Tuesday, April 30, 2019 5:32 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Subject: Comments on proposed new rules CrR 3.7, 3.8, 3.9, 4.7, and 4.11

I am writing to provide some comments on newly proposed rules. Proposed rules 3.7, 3.8, 3.9 and 4.11 should be rejected. CrR 4.7(a)(4) is poorly written and vague and therefore should be rewritten if the State's Brady obligations are to be incorporated into the Criminal Rules.

CrR 3.7-3.8 – In General

- The fact finder is the sole judge of credibility. Rules 3.7- 3.8 propose something extraordinary: the suppression of constitutionally valid evidence that a jury may still find credible. 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 witnesses identified someone (3.8) are so inherently unreliable that they should be inadmissible, unless there is video proof. In essence 3.7 and 3.8 say that police, because they are police, cannot fulfill hearsay exceptions (party opponent, statement for ID). This undermines the fundamental nature of our fact finding system: allowing the jury to determine credibility.

- Also, with the exception of a defendant's statement (reading Miranda, privacy act consideration, ect...), I can think of no evidence for which admissibility hinges upon following specifically delineated procedural requirements (which is what 3.7 and 3.8 proposes). Defense can cross examine a cop regarding their memory, bias, etc...

Also:

- Is 3.7 limited to law enforcement? If yes, it should say so. Or does it apply to all statements made by a person under investigation? Example: Can a wife "interrogate" her husband under 3.7?

- 3.7(a) – What does "person under investigation" mean? Is it subjective or objective? If police talk to a person who they subjectively think is merely a witness, and later it becomes clear the person is a suspect, should that have recorded? Will defense be able to argue, "the police should have known person X was a person of interest, therefore should have video recorded, therefore the statement is suppressed?" That's an absurd result.

- Police frequently try to speak to people casualty, throwing a video recorder in a person's face may stop them from talking, and therefore limit the ability of law enforcement to get information and keep the community safe. In the chaotic aftermath of a crime, many people may be witness and or possible suspect. Does an officer need to turn on the recording for everyone?

- 3.7(b)(2) – How do you record someone's refusal to be recorded when the privacy act would prohibit such a recording of their refusal to be used against them?

- 3.7(b)(5) – this reads poorly. Are only routine booking questions in other jurisdiction excluded?

- What about statements taken by officer's out of Washington? Would out of jurisdiction statements only be admissible if conducted during routine booking?

- 3.8(c)(7) - This is extraordinary. If I read it correctly, Police must obtain a "detailed summary" of what anyone making an ID has said to anyone about the ID. So, if police don't get a detailed summary of every conversation an eye witnesses has about the "the identification," the ID could be suppressed. Example: V is robbed at gun point. V tells 20 different people, family and friends, about the incident, including describing the suspect. If police don't get a summary of each conversation, V's ID procedure may be excluded

- 3.9 – This is incredible and is a blatant comment on evidence. This would codify an incorrect assumption that all in court ID's are unreliable. Defense can cross examine an in court ID. But we should not be suppressing general categories of evidence. Each case should be examined individually, looking at specific factors, to determine the reliability of particular evidence (in court ID) in specific cases. The jury should be allowed to judge the credibly to an identification.

4.7(a)(4) – In General – The proposed rule is written poorly and could create more confusion.

- 4.7(a)(4) – This conflates Brady material with other non-Brady Materials. The State's non-Brady obligations need to continue to be "limited to material and information within the knowledge, possession or control of members of the prosecuting attorney's staff." Otherwise the State would technically be required to disclose all information know to anyone, even by uncooperative civilians whom have never spoken to police, otherwise it would be a violation of the State's discovery obligations. That impossible and absurd.

- 4.7(4)(a)(4) reads in part – "This includes favorable evidence known to others acting on the State's behalf in the case, including the police." "Favorable" evidence to whom? We know the answer, to the "defendant," but the rule would need to say so.

- 4.7(4)(a)(4) reads in part – "This includes favorable evidence known to others acting on the State's behalf in the case, including the police." Are civilians witnesses the State anticipates calling at trial "acting on the State's behalf"? If there is a rule detailing the State's Brady obligations, it needs to be more specific as to whom it applies to.

- 4.11 – If a similar rule is adopted, it should explicitly require defense to provide the State with recording. 4.7 does not require this.

- 4.11(d) – This entire section should be stricken. It is inappropriate to use someone's right to refuse to be recorded against them, just as it is inappropriate to use a defendant's right to refuse to speak to police, or right to refuse a voluntary search again him/her.

Thank you for your consideration.

Jason L. Simmons