DANIEL T. SATTERBERG
PROSECUTING ATTORNEY

King County

Office of the Prosecuting Attorney
CRIMINAL DIVISION - Appellate Unit
W554 King County Courthouse
516 Third Avenue
Seattle, Washington 98104
(206) 477--9497

29 April 2019

MEMORANDUM

TO: Susan Carlson, Clerk of the Supreme Court

FROM: Jennifer Joseph, Senior Deputy Prosecuting Attorney, WSBA 35042

SUBJECT: Comments on Proposed Changes to Criminal Rules

Dear Ms. Carlson:

Thank you for the opportunity to provide comments on several proposed changes to the criminal court rules. I have many sincere concerns about the proposed new rules and amendments, and urge the Court to reject them for the reasons explained below.

Proposed New Rule CrR 3.7: Recording Conversations

This proposed rule would require audiovisual recording of interrogations of persons under investigation for any crime, subject to certain problematic exceptions, or else the unrecorded statement—and any subsequent statement whether recorded or not—is presumed inadmissible. The proposed rule should be rejected for multiple reasons.

First, it presumes that all entities conducting investigations have access to audiovisual recording equipment, capacity to store gigabytes of digital data in perpetuity, and subjects these entities to an undefined requirement of diligence in maintaining recording equipment. But they do not. The rule thus places an enormous, unfunded burden on local police agencies and other investigating entities. The decision whether to incur the significant expense of acquiring and maintaining such equipment and storage capacity should be made by the agencies and entities involved and the federal, state and local governments of which they are part.

Second, the proposed rule lacks reasonable limits. By requiring audiovisual recording of any person under investigation for a crime, the rule will encompass every encounter with a potential suspect. But at the beginning of an investigation, it is often unclear who is a suspect and who is not. One who speaks to law voluntarily as a witness need not be recorded, but that person may become a suspect as the investigation continues. And one who is a witness to one crime may nevertheless be "under investigation" for another crime. Further, the rule is not limited to law enforcement interrogations. One who is suspected of shoplifting may be interrogated by retail security. One who is suspected of vandalizing school property may be interrogated by the school principal. One who is suspected of neglect or abuse may be interrogated by child or adult protective services. By its terms, the rule would apply to all such interrogations.

Third, the rule will deter cooperation with and impede law enforcement. Many people object to being recorded while speaking to police. By requiring police to record even their refusal to be recorded, the rule will foreseeably decrease the public's cooperation.

Fourth, the rule provides an exception to the recording requirement in the case of "substantial exigent circumstances" or equipment malfunction "if due diligence is met in maintaining the equipment." But these terms are undefined, and will only lead to extensive litigation.

Finally, the consequences of the proposed rule are draconian. Where an individual's initial statement has not been recorded, that and *all subsequent statements* are presumed inadmissible, whether the later statements are recorded or not. The only way to overcome the presumption is to produce clear and convincing evidence that the statement was voluntarily given and is reliable. But often, the probative value of a suspect's statement lies in the fact that it is demonstrably untrue. The rule is also unclear as to whether the government would have to prove that an initial unrecorded statement was voluntary and reliable, or whether every subsequent statement must be proven so. This extreme rule will keep relevant and sometimes critical evidence from the jury when there is no question that a statement was voluntarily given.

Proposed CrR 3.8: Recording Eyewitness Identification Procedure

This proposed rule would preclude admission of any out-of-court identification procedure, such as a photo array, line-up, or show-up by law enforcement, unless the procedure is recorded. It should be rejected.

This proposed rule will compromise effective law enforcement because many people are reluctant to cooperate with law enforcement in the first place, and requiring them to be recorded while doing so will discourage participation by victims of domestic and gang-related violence who reasonably fear retaliation.

Further, the rule is impractical for the same reasons recording all interviews of potential suspects is impractical—most law enforcement agencies in Washington lack the resources to record and preserve recordings of these interactions.

It is also unclear how the proposed rule improves upon the existing rules pertaining to out-of-court identifications. Currently, defendants may attack identification procedures in cross-examination, and the jury decides how much weight to give the out-of-court identification. The proposed rule would make the trial judge the arbiter of, for example, whether it was "practicable" for police to have videotaped the interaction.

Section (b) of the proposed new rule is also problematic. First, it expands the scope of the rule from "eyewitness identification procedures" to include "related interviews," without explaining what that means. Second, it requires video recording "when practicable" but does not identify who decides whether videotaping all identification procedures and related interviews is "practicable" or provide any guidelines for making that determination. The rule also provides that if recording the interaction is not "possible," then "administrators" should produce a detailed written report about the interview or identification procedure, but the rule does not explain what it means by "administrators" and provides no guidelines for determining whether recording was

"possible." A related problem is that the proposed rule fails to acknowledge that witnesses have a right to refuse to be recorded under the Washington Privacy Act, and it is unclear whether invocation of that right is sufficient to render the recording not "practicable" or not "possible." Section (c) of the proposed rule identifies what must be included in the recording. Among other things, the rule requires that the recording document the identity of any individuals who witnessed the identification procedure and any individuals with whom the witness has ever spoken about the identification. Crime scenes are dynamic. Live identification procedures might be witnessed by dozens of people who do not stick around to give police their contact information, or who witness the identification procedure from inside and are completely unknown to police. Witnesses who make identifications might not tell police who all they have spoken to about the identification. This requirement is unreasonable, impractical, and includes no exception for "impossibility."

Section (d) provides the remedy for a violation of the rule. It is problematic because it allows the trial judge to exclude the identification testimony or take other remedial action whenever the record of the identification procedure is "lacking important details" that it was "feasible" to obtain without identifying what "important details" means or who decides whether or not it was "feasible" to obtain them. The rule permits a judge to "fashion an appropriate jury instruction" for use in evaluating the reliability of the identification without providing any direction to the trial court. This invites the judge to make a comment on the evidence, thereby committing a constitutional violation.

Section (h) is also a problem. It permits defense counsel to provide these recorded interviews and identification procedures to the defendant without the prosecutor's or court's knowledge or approval, with limited and insufficient redactions. Without notice to the court and prosecutor, there will be no way to know if the redactions have been appropriately made, and since there is no penalty for failing to make the redactions, there is no incentive for defense counsel to spend the time to carefully ensure protected information about victims and witnesses is not provided to the defendant. The rule thus compromises victim and witness privacy and public safety.

Proposed CrR 3.9: In-Court Eyewitness Identification

The proposed rule would preclude in-court identifications where the perpetrator is "unknown" to the witness and there has been no prior out-of-court eyewitness identification procedure. The rule wrongly presumes that in-court identifications are always unreliable, and seems at odds with the prevalent defense argument that in-court identifications should be precluded if there has been a prior out-of-court identification. Additionally, the term "unknown" is undefined and it is unclear whether the rule would apply to law enforcement witnesses. Finally, application of the rule may unfairly preclude the jury from hearing reliable, relevant evidence, and this may in turn cause the jury to wrongly infer there was no witness capable of identifying the defendant as the perpetrator of a crime. Defendants may test the reliability of in-court identifications through cross examination; how much weight to give such evidence is properly left to the fact-finder. This arbitrary bright-line rule seems designed to hamstring the prosecution, not to make trials fairer or better vehicles for ascertaining the truth.

Proposed Amendments to CrR 4.7: Discovery

The proposed amendments to CrR 4.7 radically and unjustifiably expand the prosecutor's discovery obligations to unworkable and unnecessarily punitive proportions. The proposed changes do not serve the people of Washington and should be rejected.
The proposed amendment to section (a)(3) requires the prosecution to disclose "any material or information within the prosecuting attorney's knowledge" which "tends to impeach a State's witness." This section expands the State's Brady obligations, which already require the State to disclose information that is "material" to guilt or punishment, to include any information—material or not—that "tends to impeach" any State witness. The absence of a materiality (or even relevance) requirement would mean that the State must monitor and disclose any inconsistent statement or crime of dishonesty of anyone who testified for the State, whether it is relevant or useful or not. Given that this obligation continues in perpetuity under proposed amendments to section (a)(4), the proposed rule would pose an impossible burden on the prosecution and should be rejected.

The proposed amendment to section (a)(4) eliminates a key limitation on existing discovery rules, so that the prosecution must seek out and disclose information of which it is not reasonably expected to possess. The existing rule limits the scope of the prosecution's discovery obligation to that "material and information within the knowledge, possession or control of members of the prosecuting attorney's staff," and has been interpreted to include the information and material known, possessed, or controlled by law enforcement agencies. Eliminating this limitation means that the prosecution is obligated to uncover and disclose non-material information known to civilian witnesses over which the State has no control or authority. This proposed amendment also extends the State's obligation into perpetuity, but fails to explain who should receive such disclosures. It thus implies an obligation to locate an unrepresented defendant even if the conviction is final, the sentence has been served, and the conviction may even have been vacated. This is an unreasonable burden with respect to evidence that is not materially exculpatory.

Finally, the proposed amendment provides that defense counsel may provide discovery to the defendant without the notice or approval of the prosecutor or trial court. As noted above, changes that encourage or allow violent offenders unfettered access to personal information about witnesses and victims pose an unreasonable risk to the safety and security of those people. Proposed section (4)(h) entrusts defense counsel to make certain limited redactions, but these redactions are insufficient. Unredacted information would include victim/witness contact information, information about where they work and go to school, confidential medical, mental health and counseling records, and photos and videos—even if those contain descriptions or depictions of sexual contact. While defense counsel is always permitted to review these items with the defendant, it should be obvious that turning such material over the defendant for his or her personal use poses unnecessary and indefensible risks to witnesses and victims. Further, the absence of any effective remedy for failing to make even the limited redactions authorized by the rule discourages careful review of these materials by busy defense counsel.

PROPOSED CrR 4.11: RECORDING WITNESS INTERVIEW

This proposed rule allows counsel for any party to record witness interviews. It dictates that the person conducting the interview confirm certain information has been given to the witness, but does not require the interviewer to inform the witness of their right to refuse to be recorded. If a victim or witness refuses to be recorded, the rule authorizes the trial court to craft a jury instruction "to examine the statement carefully," which calls for a comment on the evidence and suggests the jury should hold the victim or witness's invocation of their right not to be recorded against them. The jury is already informed if a witness has refused to be recorded, and is instructed to consider any relevant circumstances is judging the witness's credibility. The defense may already argue that the witness's refusal to be recorded is relevant to their credibility. This rule does not improve the fairness of a criminal trial, and is inconsistent with the obligation to treat victims and witnesses "with dignity, respect, courtesy and sensitivity" and to protect the rights of victims and witnesses "in a manner no less vigorous than the protections afforded criminal defendants." RCW 7.69.010. The rule should be rejected.

Thank you for your consideration.

Sincerely,

Jennifer P. Joseph
WSBA #35042

Tracy, Mary

From: OFFICE RECEPTIONIST, CLERK
Sent: Monday, April 29, 2019 12:54 PM
To: Tracy, Mary
Subject: FW: Comments on proposed court rules
Attachments: 29 April 2019_Comments on Proposed Rules.pdf

From: Joseph, Jennifer [mailto:Jennifer.Joseph@kingcounty.gov]
Sent: Monday, April 29, 2019 12:53 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Subject: Comments on proposed court rules

Please see attached comments.

Thank you!

Jennifer P. Joseph
Senior Deputy Prosecuting Attorney
WAPA Appellate Resource Attorney
King County Prosecuting Attorney's Office
206.477.9530
jennifer.joseph@kingcounty.gov
she/her pronouns