Tracy, Mary

From: OFFICE RECEPTIONIST, CLERK
Sent: Wednesday, April 24, 2019 4:03 PM
To: Tracy, Mary
Subject: FW: Proposed new rules
Attachments: Proposed new rules 3.7-4.11.docx; Issues with proposed ct rule changes.docx

Importance: High

From: Puckett, Jessica [mailto:jpuckett@kingcounty.gov]
Sent: Wednesday, April 24, 2019 3:45 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Cc: jessicadpuckett@gmail.com
Subject: Proposed new rules
Importance: High

Good afternoon,

I am a prosecuting attorney with King County, and I support the new rules. I have read my office's position on the new rules and believe that their value outweighs those concerns, which frankly seem exaggerated. The future of criminal justice is *more* transparency, as evidenced by the adoption of body cameras. Most of the arguments against these changes could just as easily apply to body cameras.

Washington should lead the nation by adopting these new rules, which promote transparency, accountability, and truth-seeking. Surely, we can work through the ground-level logistics in order to achieve these laudable goals.

Thank you for your time.

Best,
Jessica

Jessica D. Puckett
Deputy Prosecuting Attorney
Seattle District Court
King County Prosecuting Attorney's Office
JPuckett@kingcounty.gov | 206.263.2215

*Please note that email is the best way to reach me.

From: Taguba, Leah <Leah.Taguba@kingcounty.gov>
Sent: Friday, April 12, 2019 2:08 PM
To: PAO DC <paodcgrp@kingcounty.gov>
Subject: FW: Your input is vital! Last call to comment on court rule changes
Importance: High

Hello DCU!

There are some crazy changes that the defense bar wants to make to many of the current rules. If these changes are adopted, it will SEVERELY affect your practice in DCU and beyond. It is vital these changes do not get approved. How can I keep that from happening, Leah, you ask? Well, it is quite easy, as Donna Wise has done much of the work for us already.

All you need to do is read the new proposals, and email the supreme court at the email listed below (just click the hyper link) by the deadline (April 30), and cut and paste all the reasons that Donna Wise mentioned in her other attachment that you agree with regarding any or all of the rules you wish to make comment on! Or you can write your own comments. No need to be fancy, just that it gets in.

I have commented on 2 of the rules myself so far, and below is a copy of the email I sent that comments on CrR 3.7:

At the misdemeanor level thousands of cases are referred to the King County Prosecuting Attorney's Office for review each year by numerous law enforcement agencies. Each agency with hundreds of officers on the roads and in the communities each and every month of the year. Those agencies make thousands more social contacts, civil matters related contacts, as well investigations that result in the discovery that no crime occurred, that our office never even sees.

The proposed changes seem to create the following issues and therefore SHOULD NOT BE APPROVED:

1) *The audiovisual recording requirement for every "custodial and non-custodial interrogation of persons under investigation for any crime" is extremely burdensome from a fiscal stand point for all law enforcement agencies to comply with. It is further burdensome to require proof of "due diligence" in maintaining equipment, and for such long periods of time (habeas review has no time limit).*
2) *It is further over burdensome to require recording of contacts of any potential suspect in a criminal investigation no matter how casual or innocuous the circumstance is.*
3) *It does not address what happens if a contact turns into an investigation of a crime, and what the protocol is and what are the consequences for non-compliance.*
4) *It may impede an effective police investigation due to individuals who are fearful, reluctant or unwilling to have their contact recorded.*
5) *It could violate individuals' privacy rights.*
6) *The recording of a refusal seems contrary to the privacy interest and right of the individual who refuses to be recorded.*
7) *It could make available massive amounts of recordings of individuals that would be subject to the public records act.*
8) *This rule suggests that officers are inherently untrustworthy or incompetent, and cannot be taken at their word regarding investigations.*
9) *This rule suggests that statements not taken in compliance with the rule is untrustworthy, and again codifies that officers are inherently untrustworthy or incompetent.*
10) *The consequences for violation of the rule of exclusion of the statements and all subsequent statements is terribly extreme and unnecessary.*
11) *When overcoming the presumption of inadmissibility, the "reliability" requirement may be contrary to an argument that the statement is probative by the fact that it is not true or it is false.*

12) *The standard of proof to overcome the presumption of inadmissibility is a higher standard that constitutional violation which seems arbitrary and inequitable to the proponent of the statement.*

Leah Taguba

From: Wise, Donna <Donna.Wise@kingcounty.gov>
Sent: Wednesday, April 10, 2019 11:42 AM
To: ZZGrp, PAO Criminal Division <paocrimdiv@kingcounty.gov>
Cc: Craig, Cristy <Cristy.Craig@kingcounty.gov>; Jacobsen-Watts, Heidi <Heidi.Jacobsen-Watts@kingcounty.gov>; Kanner, Samantha <Samantha.Kanner@kingcounty.gov>; Kinerk, Dan <Dan.Kinerk@kingcounty.gov>; Port, Cindi <Cindi.Port@kingcounty.gov>; Montgomery, Amy <Amy.Montgomery@kingcounty.gov>; Van Olst, Kathy <Kathy.VanOlst@kingcounty.gov>
Subject: Your input is vital! Last call to comment on court rule changes

One last reminder – if you want to comment on these proposed rule changes, the **deadline is April 30**.

What am I talking about? **Radical court rule changes proposed by the defense bar.**
The proposed rules endanger victims, witnesses, and the pursuit of justice.

The Supreme Court is considering the proposals and has asked for comments. Anyone can comment, you need not be a lawyer. It is easy: just send your comment in an email to supreme@courts.wa.gov **by April 30**.

A few notes on proposals that are included:

Anyone "under investigation" for any crime would have to be video recorded when any questions are asked. If a person refuses to be recorded, that refusal must be recorded. The lack of recording equipment is irrelevant. If the required recording does not happen, that statement and all future statements would be suppressed. (proposed new CrR 3.7)

Defense counsel would be allowed to provide copies of virtually all discovery, including all photos, medical records, CPS records, and recordings, to the defendant without notice to the prosecutor or the court. There is no limitation on the defendant's use or distribution of that material. (proposed amendment to CrR 4.7)

If a witness refused to be recorded for a defense interview, the court would be required to instruct the jury to question the credibility of the witness. And a witness could be openly recorded without being informed of the right to refuse. (proposed new CrR 4.1)

Attached are the proposed new rules and a document summarizing the proposals and objections that have been made.

Please take this opportunity to express your opinion to the court. It matters very much.

Thanks.

-Donna

SUGGESTED NEW CRIMINAL RULE CrR 3.7

CrR 3.7 RECORDING INTERROGATIONS

(a) Recording Interrogations. Custodial and non-custodial interrogations of persons under investigation for any crime are to be recorded by an audiovisual recording made by use of an electronic or digital audiovisual device.

(b) Exceptions.

(1) A spontaneous statement not made in response to a question;

(2) The person requests prior to making the statement that an electronic recording not be made, and the request is electronically recorded;

(3) Malfunction of equipment, provided due diligence has been met in maintaining the recording equipment;

(4) Substantial exigent circumstances exist which prevent the recording;

(5) Statements made as a part of routine processing or "booking"; when the interrogation takes place in another jurisdiction.

The State has the burden to prove by a preponderance of the evidence that an exception is applicable.

(c) Consequences of Failure to Record. If the court finds by a preponderance of the evidence that a person was subjected to custodial or non-custodial interrogation in violation of this rule, then any statements made by the person during or following that non-recorded custodial interrogation, even if otherwise in compliance with this section, are presumed to be inadmissible in any criminal proceeding against the person, except for purposes of impeachment.

The presumption of inadmissibility may be overcome by clear and convincing evidence that the statement was voluntarily given and is reliable, based on the totality of the circumstances.

(d) Preservation. Recordings are to be preserved until the conviction is final and all direct and habeas corpus appeals are exhausted, or until the prosecution is barred by law. In all class A felonies, recordings are to be preserved for 99 years.

SUGGESTED NEW CRIMINAL RULE CrR 3.8

CrR 3.8 RECORDING EYEWITNESS IDENTIFICATION PROCEDURE

(a) Recording. An out-of-court identification procedure resulting from a photo array, live lineup, or show-up identification procedure conducted by a law enforcement officer shall not be admissible unless a record of the identification procedure is made.

(b) Documenting the Procedure.

(1) All identification procedures and related interviews conducted with any victim/witness should be fully documented. Video-recording should be used when practicable. Audio recording is the preferred alternative. If neither video- nor audio-recording is possible, administrators should produce a detailed written report of the interview or identification procedure immediately following completion of the procedure.

(2) A confidence statement should be obtained immediately after the victim/witness makes a decision. The exact words used by the victim/witness in expressing his/her degree of confidence should be documented.

(c) Contents. The record of an out-of-court identification procedure is to include details of what occurred at the out-of-court identification, including the following:

(1) The place where the identification procedure was conducted;

(2) The dialogue between the witness and the officer who administered the procedure;

(3) The results of the identification procedure, including any selection, or lack of selection, made by the witness/victim;

(4) If a live lineup, a photo of the lineup; if the identification procedure includes movements, a video of the identification procedure; if the identification procedure includes speaking, an audio recording of the speaking and a photo of the identification procedure;

(5) If a photo lineup, the photographic array, mug books or digital photographs used, including an unaltered, accurate copy of the photographs used, and an accurate copy upon which the witness indicated his or her selection;

(6) The identity of persons who witnessed the live lineup, photo lineup, or showup, including the location of such witnesses and whether those witnesses could be seen by the witness making the identification decision;

(7) The identity of any individuals with whom the witness has spoken about the identification, at any time before, during, or immediately after the official identification procedure, and a detailed summary of what was said. This includes the identification of both law enforcement officials and private actors who are not associated with law enforcement.

(c) Remedy: If the record that is prepared is lacking in important details as to what occurred at the out-of-court identification procedure, and if it was feasible to obtain and preserve those details, the court may, in its sound discretion and consistent with appropriate case law, declare the identification inadmissible, redact portions of the identification testimony, admit expert testimony, and/or fashion an appropriate jury instruction to be used in evaluating the reliability of the identification.

SUGGESTED NEW CRIMINAL RULE CrR 3.9

CrR 3.9 IN-COURT EYEWITNESS IDENTIFICATION

In-Court Identifications. In-court identifications are inadmissible where the perpetrator is unknown to the witness and there has been no prior out-of-court eyewitness identification procedure.

SUGGESTED AMENDMENT TO CRIMINAL RULE CrR 4.7 DISCOVERY

CrR 4.7 DISCOVERY

(a) Prosecutor's Obligations

(1) Unchanged.

(2) The prosecuting attorney shall disclose to the defendant:

(i) Unchanged.

(ii) Unchanged.

(iii) Unchanged.

(iv) All records, including notes, reports, and electronic recordings relating to an identification procedure, as well as all identification procedures, whether or not the procedure resulted in an identification or the procedure resulted in the identification of a person other than the suspect.

(3) Except as is otherwise provided as to protective orders, the prosecuting attorney shall disclose to the defendant's counsel any material or information within the prosecuting attorney's knowledge which tends to negate defendant's guilt as to the offense charged~~,~~ and/or which tends to impeach a State's witness.

(4) The prosecuting attorney's obligation under this section ~~is limited to material and information within the knowledge, possession or control of members of the prosecuting attorney's staff.~~ includes material and evidence favorable to the defendant and material to the defendant's guilt or punishment, and/or which tends to impeach a State's witness. This includes favorable evidence known to others acting on the State's behalf in the case, including the police. The prosecuting authority's duty under this rule not conditioned on a defense request for such material. Such duty is ongoing, even after plea or sentencing.

(b) Defendant's Obligations. Unchanged.

(c) Additional disclosures Upon Request and Specification. Unchanged.

(d) Material Held by Others. Unchanged.

(e) Discretionary Disclosures. Unchanged.

(f) Matters Not Subject to Disclosure. Unchanged.

(g) Medical and Scientific Reports. Unchanged.

(h) Regulation of Discovery.

(1) *Investigation Not to Be Impeded.* Unchanged.

(2) *Continuing Duty to Disclose.* Unchanged.

(3) *Custody of Materials.* Any materials furnished to an attorney pursuant to these rules shall remain in the exclusive custody of the attorney and be used only for the purposes of conducting the party's side of the case, unless otherwise agreed by the parties or ordered by the court, and shall be subject to such other terms and conditions as the parties may agree or the court may provide. Further, a defense attorney shall be permitted to provide a copy of the materials to the defendant after making ~~appropriate~~ the following redactions: ~~which are approved by the prosecuting authority or order of the court.~~

(i) Dates of Birth—redact to the year of birth;

(ii) Names of Minor Children—redact to the initials;

(iii) Social Security Numbers or Federal Taxpayer Identification Numbers—redact in their entirety;

(iv) Financial Accounting Information—redact to the last four digits;

(v) Passport Numbers and Driver License Numbers—redact in their entirety;

(vi) Home Addresses—redact to the City and State; and

(vii) Phone Numbers—redact in their entirety.

Each defense attorney shall maintain a duplicate copy of discovery furnished to the defendant they are representing, which shows the redactions made in accordance with this court rule for the duration of the case. The duplicate copy of discovery with redactions shall be kept in the client's case file. If the defense attorney withdraws from representing the defendant, the duplicate copy with redactions shall be furnished to the new attorney and maintained in the new attorney's case file for the defendant for the duration of the case. The court may, upon proper showing, request to see the duplicate copy with redactions that has been furnished to the defendant, to make sure the redactions have been properly made.

(4) *Protective Orders.* Unchanged

(5) *Excision.* Unchanged

(6) *In Camera Proceedings.* Unchanged

(7) *Sanctions.* Unchanged

SUGGESTED NEW CRIMINAL RULE CrR 4.11

CrR 4.11 RECORDING WITNESS INTERVIEWS

(a) Recording of Witness Interviews. Counsel for any party, or an employee or agent of counsel's office, may conduct witness interviews by openly using an audio recording device or other means of verbatim audio recording, including a court reporter. Such interviews are subject to the court's regulation of discovery under CrR 4.7(h). Any disputes about an interview or manner of recording shall be resolved in accordance with CrR 4.6(b) and (c) and CrR 4.7(h). This rule shall not affect any other legal rights of witnesses.

(b) Providing Copies. Copies of recordings and transcripts, if made, shall be provided to all other parties in accordance with the requirements of CrR 4.7. If an interview is recorded by a court reporter, and is discoverable under CrR 4.7, any party or the witness may order a transcript thereof at the party's or witness's expense. Dissemination of audio recordings or transcripts of witness interviews obtained under this rule is prohibited except where required to satisfy the discovery obligations of CrR 4.7, pursuant to court order after a showing of good cause relating solely to the criminal case at issue, or as reasonably necessary to conduct a party's case.

(c) Preliminary Statement. At the commencement of any recorded witness interview, the person conducting the interview shall confirm on the audiotape or recording that the witness has been provided the following information: (1) the name, address, and telephone number of the person conducting the interview; (2) the identity of the party represented by the person conducting the interview; and (3) that the witness may obtain a copy of the recording and transcript, if made.

(d) Witness Consent. A witness may refuse to be recorded. In the event that a witness refuses to be recorded, and there is a dispute regarding any statement made by the witness, the jury should be instructed to examine the statement carefully in the light of any reasons for the refusal and other circumstances relevant to that witness's testimony, including, but not limited to, bias and motive.

Submitting comments on proposed court rules

Each section of each proposed new rule is summarized here and followed by a list of concerns raised, as bullet points. If you find any of the concerns valid, feel free to include them in your comment to the court about the proposed rule/ amendment.

Comments should be submitted to the **Clerk of the Supreme Court** by either U.S. mail or email. Comments may be sent to the following addresses: P.O. Box 40929, Olympia, WA 98504-0929, or supreme@courts.wa.gov. Comments submitted by e-mail may not exceed 1500 words.

You may attach a letter to the email or include your comments within the email.

The **deadline for comments** to these rules is **April 30, 2019.**

FYI, comments are posted on the Washington Courts' website and are available to the public.

Note as to both proposed CrR 3.7 and 3.8

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

CrR 3.7 RECORDING INTERROGATIONS suggested new rule

(a) Custodial and non-custodial interrogations of persons under investigation for any crime are to be audiovisually recorded, by electronic or digital device.

- **Proposed CrR 3.7 will impede effective law enforcement because many individuals are reluctant to be recorded.** Requiring them to be recorded will decrease cooperation with police. It is illogical and a violation of the Washington Privacy Act to record the refusal of a person who refuses 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, as many will be reluctant to speak when video recorded.** The rule does not take into account that a person may first appear to be only a witness but later become a suspect.
- **The rule encompasses every encounter with a potential suspect, no matter how casual or innocuous, on the scene, on the street, at their home, in a vehicle, or at any other location.** It imposes an unreasonable burden on law enforcement.
- **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.** The additional burden of preserving detailed maintenance records of every recording device used also is unwarranted.
- Proposed CrR 3.7 would require sweeping changes to police procedure in the investigation of every incident that may constitute a crime. Not only would it obstruct these investigations, it is an unrealistic mandate and unless it is funded by the court, impossible due to lack of equipment that would be required.

- The rule presumes that any statement not taken in compliance with the rule is untrustworthy. It codifies a presumption that officers who have taken an oath to uphold the law are presumed to be unreliable witnesses. It shifts the normal burden away from the person trying to suppress the evidence onto the State, with no reason.
- 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 rule does not define "interrogation." Subsection (b) suggests any question is an interrogation. It could be broadly interpreted to include actions likely to provoke a response.
- 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.
- This is an unwarranted burden on police investigations.
- The rule does not limit applicability to events that occur after enactment of the rule. Even if it did, most law enforcement agencies will be unable to immediately acquire video recording equipment for all officers to carry at all times (the financial and practical obstacles would be overwhelming), and to retroactively create maintenance records as to existing equipment.
- The rule will require litigation as to whether the questioner knew the person questioned was "under investigation," when the questioner knew that, and perhaps whether the questioner should have known the person could be implicated in a crime (<u>any</u> crime). Is it a subjective or an objective standard? What if the person becomes a suspect mid-questioning?
- Proposed CrR 3.7 is an improper exercise of the court's authority, forcing specified investigative procedures without legal authority to direct police use of resources and the nature of their interrogations.

(b) <u>Exceptions</u>. State has the burden of proof that an exception applies by a preponderance.

(1) Spontaneous statement not in response to question.
(2) Prior to the statement, the person <u>refuses</u> recording, and <u>*that* is electronically recorded</u>.

- The requirement that a refusal be recorded violates the subject's rights under the Washington Privacy Act right not to be recorded.
- A person who refuses to be recorded will not permit recording that either.

(3) Equipment malfunction, if due diligence is met in maintaining the equipment.

- **The requirement of "due diligence" in maintaining equipment 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.**
- It is a substantial and unreasonable burden on police agencies (and other investigating agencies) to establish a maintenance protocol and maintain records of maintenance of all recording equipment.

(4) Substantial exigent circumstances prevent recording.

- **The meaning of "substantial exigent circumstances" is unclear. Would it include the scene of a traffic collision? Would it apply if the suspect is in the hospital? Would it apply if the suspect is at a facility (e.g. SCORE) with no video available?**
  - **Does "substantial exigent circumstances" extend to an officer's determination that recording will impede a homicide investigation?**
  - Does "substantial exigent circumstances" include covert operations or knock-and-talk investigative procedures?

(5) Routine processing/ "booking," interrogation in another jurisdiction.

- **This subsection does not make sense.**
- The only way that the reference to "interrogation in another jurisdiction" makes sense is if it is intended to be listed as a separate exception.

(c) Consequences. If a court finds a violation of the rule by a preponderance, any statement during or following that interrogation, even if it otherwise complies with this rule, is presumed inadmissible in any criminal proceeding against the person, except for impeachment. The presumption may be overcome by clear and convincing evidence that the statement was voluntarily given and is reliable, based on the totality of the circumstances.

- **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 unclear whether, to overcome the presumption, the initial statement must be proven voluntary and reliable or every subsequent statement must be.
- The standard for overcoming the presumption of inadmissibility grants to the judge the decision that should be left to the jury – the probative value to be given to these statements.
- 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.

(d) Preservation. Recordings must be preserved until conviction is final and all direct and habeas appeals are exhausted, or until prosecution is barred by law. "In all Class A felonies" must be preserved for 99 years.

- The rule requires preservation of all interrogation recordings until the subject dies (there is no limit to habeas review).
- As to all crimes that could be prosecuted as a Class A felony (including all deaths and most sex crimes), all interrogations must be preserved for 99 years, even if it is concluded that a death was suicide, or a defendant confesses, is prosecuted and dies. This mass of recordings would be available to the public.

CrR 3.8 RECORDING EYEWITNESS IDENTIFICATION PROCEDURE

suggested new rule

(a) Out-of-court i.d. procedure resulting from a photo array, live lineup, or show-up by law enforcement shall not be admissible unless a record of the i.d. procedure is made. Video is directed; video or audio recording is required if possible.

- 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.

(b) **Documenting the procedure**.

(1) All identification procedures and related interviews with any V/W should be fully documented. Video-recording when practicable, audio recording is the preferred alternative. If neither video- nor audio-recording is possible, administrators should produce a detailed written report of the interview or identification procedure immediately following completion.

- **It is unclear that the lack of availability of recording devices would be a legitimate reason not to video record the procedure.** Such an exception must be included.

- **The rule does not make clear that a witness's assertion of their right not to be recorded (under the Privacy Act) would establish that recording was not possible.**
- The rule does not define "when practicable." Who makes that decision?
- What does the reference to "administrators" mean? Supervisors?
- What "is possible" is a standard that is impossible to interpret. Does it allow an exception for exigent circumstances, lack of equipment, or community safety?

(2) A confidence statement should be obtained immediately after V/W makes a decision. Exact words used should be documented.

- The term "exact words" is unreasonably vague. How many words must be documented? What if the procedure is not recorded and the witness provides a lengthy explanation of the choice? What if the person is a non-English speaker – must the non-English words be documented?
- Should it not also require documentation of the relevant context of the words used, including the demeanor of the suspect and the witness?

(c) **Contents.** Record to include details of what occurred, including: (1) place; (2) dialogue between W & officer who administered; (3) results; (4) if live lineup, photo of lineup; if procedure includes movements, video; if procedure includes speaking, audio recording of the speaking and a photo of the i.d. procedure; (5) if photo lineup, the photo array, mug books or digital photos used, including an unaltered, accurate copy of the photos used, and an accurate copy upon which W indicated his or her selection; (6) identity of persons who witnessed the live lineup, photo lineup, or showup, including location of Ws and whether Ws could be seen by W making i.d.; (7) Identity of any individuals with whom the W has spoken about the i.d., at any time before, during, or immediately after the official i.d. procedure, & a detailed summary of what was said, including identification of law enforcement and private actors.

- (c)(4) "If the identification procedure includes speaking" would appear to mandate audio recording of all procedures, since the witness always will be given verbal directions. This may be intended to refer to the subjects of the procedure speaking for purposes of voice identification, and if so, it should say that.

- (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.
- (c)(6) It is unreasonable to require documentation of whether each person who witnesses the procedure can be seen by the witness. The scene is fluctuating, and officers can't know who the witness is able to see. Forcing the witness to look around to identify who they can see is watching will be intimidating to a frightened witness.
- (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?
- Although section (b)(1) of this rule provides for an exception to the recording requirement based on impossibility, this section must include the same exception in order for the exception to have effect.

(d) **Remedy**[numbered (c) in rule]: If the record prepared is lacking important details as to what occurred, and it was feasible to obtain and preserve those details, the court may, in its sound discretion and consistent with appropriate case law, declare the identification inadmissible, redact portions of identification testimony, admit expert testimony, and/or fashion an appropriate jury instruction to be used in evaluating the reliability of the i.d..

- **The remedies listed in CrR 3.8(d) are extreme and unreasonable.** For example, it would allow testimony of a defense expert witness on unspecified subjects, apparently regardless of compliance with applicable rules of evidence, if not every detail of the procedure and circumstances was recorded.
- **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.** It is the jury's responsibility to determine the weight of the evidence based on the information that is available and any gaps in that evidence. Further, the lack of certainty in this standard will result in inadequate guidance for law enforcement and massive litigation.

- **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.** Judicial comments on the evidence are unconstitutional in Washington.
- 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?
- The phrase "consistent with appropriate case law" is without a context and its meaning is entirely unclear. There is no case law interpreting this rule. Is it intended to limit or expand the rule or remedies?

CrR 3.9 IN-COURT EYEWITNESS IDENTIFICATION

suggested new rule

In-court identifications are inadmissible where the perpetrator is unknown to the witness and there has been no prior out-of-court eyewitness identification procedure.

- **Determination of whether an in-court identification procedure should be excluded is already adequately covered by case law – a more restrictive rule is unnecessary.**
- **The argument that already is made is that in-court identification should be precluded if there has been a prior identification procedure.** This rule sets up a Catch-22 for the prosecution, resulting in exclusion of all in-court identifications.
- **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.

CrR 4.7 DISCOVERY amendments

(a) **Prosecutor's obligations**:

(2) Shall disclose to the defendant:

(iv) [new] All records, including notes, reports, and electronic recordings re: all identification procedures, whether or not the procedure resulted in an identification or resulted in i.d. of a person other than the suspect.

(3) Shall disclose any info that tends to negate Δ's guilt as to offense charged, [new] and/or which tends to impeach a State's witness.

- 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.

(4) Prosecutor's obligation under this section ~~is limited to material and info within the knowledge, possession or control of members of the prosecuting attorney's staff.~~ includes material and evidence favorable to the defendant and material to the defendant's guilt or punishment, and/or which tends to impeach a State's witness. This **includes favorable evidence known to others acting on the State's behalf in the case,** including the police. The prosecuting authority's duty under this rule not conditioned on a defense request for such material. **Such duty is ongoing, even after plea or sentencing.**

- 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. While the Brady obligation extends to evidence known to law enforcement directly involved in an investigation, it certainly does not extend to civilians who are not State agents. If the proposed amendment is not intended to expand the Brady rule, then it is entirely unnecessary.

- The courts have defined what is "material" to guilt or punishment in cases applying the rule of Brady v. Maryland, but this rule does not refer to that definition and so invites courts to apply a much broader definition. There is no justification offered for applying a broader definition. If the proposed amendment is not intended to expand the Brady rule, then it is unnecessary.
- 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.
- This proposed amendment completely eliminates any restriction on the obligation of the State to disclose evidence that may be known to anyone. It invites the courts to conclude that the State has the duty to collect all evidence that may be exculpatory, which is the responsibility of the defense, not the State, and is an obligation that would never be satisfied.
- The overbreadth of the State's obligation to learn of all evidence that "tends to impeach" any State witness regardless of materiality is further exacerbated by the imposition of a duty to learn of such evidence and disclose it until the end of time.
- The proposed amendment imposes an obligation on the prosecution to continue to track its (and the investigating police agency, and others acting on the State's behalf) contacts with all witnesses in every case, forever, so that if they ever act in a way which would tend to impeach their testimony, that can be disclosed.
- The proposed amendment requires ongoing disclosure after sentencing, but to whom? It 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.
- 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.

(h) **Regulation of discovery.**

Defense counsel may provide discovery to the defendant without a prosecutor's or court knowledge or approval. The only redactions required before providing it are: various account/ i.d. numbers; DOB redacted to the year only; names of minors redacted to initials; home addressed redacted except for city and 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. This will delay providing discovery to the defense in most cases, and increase the workload of all parties and the courts as the requests for protective orders are litigated.
- The list of necessary redactions is obviously insufficient. Redactions that currently are required by prosecutors as a general rule also include the following: all contact information for all potential witnesses, including èmail; schools attended by witnesses; job locations and employers of witnesses; medical records; mental health and counseling records; CPS records; photos or video (including on a digital device, or in an electronic file) with images of any part of any person or animal; and any description or depictions of actual, attempted, or simulated sexual contact. 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.
- 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.

CrR 4.11 RECORDING WITNESS INTERVIEW

suggested new rule

(a) **Counsel for any party** (or an employee or agent of counsel's office) **may** conduct witness interviews by openly using an audio recording device or other means of verbatim audio recording, including a court reporter. Interviews are subject to court's regulation of discovery under CrR 4.7(h). Any disputes about the interview or manner of recording shall be resolved in accordance with CrR 4.6(b) and (c) [depositions] and CrR 4.7(h). This rule shall not affect any other legal rights of witnesses.

- 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 (by a negative jury instruction if they refuse) is simply 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 rule does not address the necessity to obtain consent to recording by all others present.

(b) **Providing Copies.** Copies of recordings and transcripts, if made, shall be provided to all other parties in accordance with the requirements of CrR 4.7. If recorded by a court reporter and discoverable under CrR 4.7, any party or the witness may order a transcript at the party's or witness's expense.

Dissemination of recordings or transcripts of witness interviews obtained is prohibited except where required to satisfy discovery obligations of CrR 4.7, pursuant to court order after a showing of good cause relating solely to the criminal case at issue, or **as reasonably necessary to conduct a party's case**.

- 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 witness in one case are often relevant to their testimony in other cases involving the same subject.
- 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 safety, where the questions that may be asked during an interview are virtually unlimited, and may include personal questions on subjects that are inadmissible at trial. That risk is unfairly imposed when the witness is being coerced to agree to recording by the provisions of this rule.

(c) **Preliminary Statement.** At the start, person conducting the interview must confirm on the recording that witness has been provided: (1) name, address, and phone number of person conducting interview; (2) identity of party represented by person conducting interview; and (3) that witness may obtain a copy of recording and transcript, if made.

- The proposed rule **does not require that victims or witnesses be informed of their option to refuse to consent to the recording of an interview. The interviewer may accurately assert that he has the "right" to record the interview, which will mislead the witness.**

(d) **Witness Consent.** A witness **may refuse** to be recorded. If the witness refuses and there is a dispute regarding any statement made by the witness, the **jury should be instructed to examine the statement carefully in the light of any reasons for the refusal and other circumstances relevant to that witness's testimony, including, but not limited to, bias and motive**.

- **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.
- If a jury is to be instructed to consider the reasons for the refusal, which it must be in order to evaluate its legitimacy, it must be permitted to hear of the prior bad acts (including threats and intimidation) of the defendant and the character of his or her associates to evaluate the witness's fear of retaliation. The witness's subjective fears, even if not based on verifiable facts, also should be considered by the jury in order to fairly evaluate the reason for the refusal. The rule should specify that if the victim is not permitted to explain the refusal in full, no instruction should be given.
- There is no reason to infer bias from the refusal to be recorded.
- The reference to motive is nonsensical.
- The jury determines the credibility of witnesses. It is already informed if a witness has refused to be recorded. The jury is instructed to consider any relevant circumstances in judging credibility and the defense may argue that the refusal is relevant. The only additional effect of this rule is to coerce the witness to be recorded and to invite a judicial comment on the witness's credibility – both are improper purposes for a court rule.