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April 30, 2019

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

Re: Proposed amendments to Criminal Rules

Dear Justice Johnson and Supreme Court Rules Committee,

This letter comments on amendments to CrR 3.7, 3.8, 3.9, 4.7 and 4.11 proposed by the Washington Association of Criminal Defense Lawyers (WACDL). I have carefully reviewed the proposed rules and most of the comment letters filed before April 26th.

I respectfully ask this Court to reject the proposed rules in their current form. As expressed in many letters already filed with this Court, language in the proposed rules is ill-defined, the needs and rights of victims are not sufficiently considered, the ability of law enforcement and trial courts to comply is not addressed, and there is no effort to analyze need, effectiveness, and costs. In light of the number of letters already submitted, rather than catalogue all my concerns, I will simply highlight three categories in this letter.

First, several of the proposed rules mandate that police record interactions with citizens. For example, proposed CrR 3.7 would require that "non-custodial interrogations of persons under investigation for any crime" be recorded. It is impossible to estimate how many citizens are investigated and released yearly without arrest or charging. Yet, all these people must be recorded under the proposed rule. Similarly, proposed CrR 3.8 pressures police to document and record details about identification procedures, even "show-up" identifications conducted when citizens are unfortunate enough to witness a crime. And, should a citizen become a full-fledged witness in a formally charged case, proposed CrR 4.7 would demand that they be interviewed and recorded.

These proposals seem to presume that equipping law enforcement with the tools to record is easy and straightforward. But, body-worn cameras and other police-initiated recordings are still a rarity in Washington, not simply because the cost of equipment, management, and storage is prohibitive for many jurisdictions, but also because a rule that mandates recording citizen witnesses raises thorny privacy concerns. See The Police, Body Cameras, and Privacy in Washington State.

<https://jsis.washington.edu/news/the-police-body-cameras-and-privacy-in-washington-state/>. These privacy concerns are most acute in cases involving immigrants, domestic

violence, gangs, or protest demonstrations, where recording the witness can jeopardize the witness's status or safety, especially to the extent that the recordings are subject to public records requests. This Court should be very cautious in adopting an allegedly procedural rule that touches upon substantive privacy rights that are traditionally addressed through legislation. And, of course, a judicially mandated recording requirement would come with no funding.

Second, the recording and discovery obligations suggested in these proposals would trigger new waves of litigation over matters that are now routine. There has been no showing that the suggested benefits of the proposals come close to justifying the increased transaction costs to the trial courts, measured in either dollars or time.

Third, in my view, proposals of this importance and scope, and which tread at the margins of procedure and substance, should be vetted by a body of objective and qualified rule-making experts that may also include partisans. Drafting quality rules is hard and tedious work. A list of letters, even a long list, is no substitute for the traditional process which ensures a careful and thoughtful process.

Very Truly Yours,

A handwritten signature in black ink, appearing to read "James M. Whisman", is written over a horizontal line.

James M. Whisman
Senior Deputy Prosecuting Attorney
King County

Tracy, Mary

From: OFFICE RECEPTIONIST, CLERK
Sent: Tuesday, April 30, 2019 9:37 AM
To: Tracy, Mary
Subject: FW: Comment to proposed criminal rules
Attachments: Final letter.docx

From: Whisman, Jim [mailto:Jim.Whisman@kingcounty.gov]
Sent: Tuesday, April 30, 2019 9:34 AM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Subject: Comment to proposed criminal rules

Dear Clerk,

Please find attached my comments to the criminal rules proposed by the Washington Association of Criminal Defense Attorneys.

Thank you,

Jim Whisman