Tracy, Mary

From: OFFICE RECEPTIONIST, CLERK
Sent: Monday, April 29, 2019 8:14 AM
To: Tracy, Mary
Subject: FW: Opposition to Proposed Changes to Washington Criminal Rules 3.7, 3.8, 3.9, 4.7 and 4.11/CrRLJ 3.7, 3.8, 3.9, 4.7 and 4.11

From: Castleton, John [mailto:John.Castleton@kingcounty.gov]
Sent: Sunday, April 28, 2019 10:06 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Subject: Opposition to Proposed Changes to Washington Criminal Rules 3.7, 3.8, 3.9, 4.7 and 4.11/CrRLJ 3.7, 3.8, 3.9, 4.7 and 4.11

Dear Clerk of the Supreme Court:

Thank you for allowing comments on the proposed rule changes to our criminal practice. I am a senior deputy prosecutor with the King County Prosecutor's Office and have 20 years' experience. For that last 12 years I have worked as a trial attorney in our Most Dangerous Offender Project Unit, solely handling homicide cases. After reviewing the proposed changes to the criminal rules noted above, I am compelled to submit this comment in opposition to those proposed changes. I am not privy to the intricacies of how the Court gets to the point of asking for public comment on suggested changes to its rules, but from what I understand, these specific proposals did not go through the normal process. It appears that these proposed rules changes were submitted by the Washington Association of Criminal Defense Lawyers (WACDL). There does appear to have been any public debate regarding these proposals, nor any input allowed from prosecutors, judges, law enforcement, or victim's rights groups, even though it is those groups who will be required to change their practices and be most affected as a result of these proposed changes. Moreover, I do not believe that any Washington State Bar committee nor any Washington State Supreme Court committee convened working groups to review these proposals. GR 9(f)(2) explicitly states that suggested rule changes are to be forwarded to the Washington State Bar Association, Superior Court Judges Association, District and Municipal Court Judge's Association, and the Chief Presiding Judge of the Court of Appeals for their consideration. My understanding is that all of these groups were bypassed. In reviewing the submissions of these proposed rule changes by WACDL, they only appear to have requested expedited review of their proposed changes to CrR 4.7, yet it appears all of their proposed changes were expedited for reasons that are not clear. Below are just a few of the concerns I see with the proposed rule changes.

Re: CrR 3.7: This proposed rule will undoubtedly impede effective law enforcement because many individuals are reluctant to be recorded, especially the most vulnerable (immigrants, domestic violence victims, victims of gang crimes). To then require a recording of a person's refusal to be recorded does not only fly in the face of the Recording Act, but is just ridiculous. This proposed rule change appears predicated on a belief that police are inherently untrustworthy and cannot be taken at their word. So instead of allow the jury or judge to make this determination with all the facts before them, the rule would require suppression of otherwise properly obtained evidence under both the state and federal constitutions.

Re: CrR 3.8: As with the proposed changes to CrR 3.7, these proposed changes would also impede effective law enforcement and intimidation of victims and witnesses as these recordings would not only be available to defendants, but to anyone making a public records request. In addition, the wording in this proposed rule change is inexact and sloppy as it uses such phrases as "important details," without giving any direction as to what is meant by these terms. Who decides what is an "important detail?" The requirement of having to document the identity of all persons who

witness every procedure is simply unreasonable, especially when dealing with complex scenes of violence. Finally, the proposed remedies listed in subsection (d) are extreme and unreasonable.

Re: CrR 3.9: In-court identification procedures are already regulated by well-settled law and this proposed change to the rule appears overly restrictive. Plus, it appears to apply to identifications made by police officers as well. Under this rule, the arresting officer or detective would be precluded from identifying a defendant in court unless they themselves had been previously shown a photo montage or lineup. 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, or in-court identification would not be permitted. So if the crime occurs over an extended period of time, allowing the witness/victim a substantial opportunity to observe the suspect, under this rule they would be precluded from identifying that person in court. As a result, the jury would be deprived of hearing all relevant evidence. The weight of that evidence is properly developed through cross-examination and determined by the jury, not an arbitrary bright-line rule.

Re: CrR 4.7(a): This proposed rule change clearly extends the reach of Brady and its progeny to civilians and places an unduly burdensome requirement for prosecutors to follow all activities of anyone "acting on the State's behalf" forever. The current rules require 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." There is no credible reason to expand this post-sentencing standard.

Re: CrR 4.7(h): Under this proposal, prosecutors will now have to seek protective orders before ever turning over any evidence, necessitating extra work for both the parties and the courts. Moreover, the list of necessary redactions is clearly insufficient. Defense counsel is always permitted to review these items with the defendant but it is obvious that putting copes of this material (including autopsy photos and reports, photos of injured victims, CPS records, 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 materials. Un: der this proposed amendment, incidents of victim/witness intimidation would likely increase.

Re: CrR 4.11: The Washington Legislature has guaranteed 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 new rule would not only fly in the face of this legislative guarantee, but also Article I, Sec. 35 of the Washington Constitution by not informing victims and witnesses of their right to refuse to be recorded. Moreover, 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. Yet in the proposed changes to CrR 4.7(h), the defendant would have unlimited access to recordings and transcripts so long as defense counsel decides it is reasonably necessary to the defense. This is an invasion of privacy and creates a risk to public and individual safety. The rule invites the 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 improper to use a person's right to refuse to be recorded against them and is inappropriate for a jury to be directed to determine the legitimacy of a person's refusal to be recorded, when that person has a right to do so.

Thank you again for allowing comments on the proposed rule changes. I strongly recommend that all the proposed changes be rejected.

Sincerely,

John B. Castleton, Jr.
Sr. Deputy Prosecuting Attorney
King County Prosecutor's Office