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April 30, 2019

The Supreme Court of the State of Washington
Clerk of the Supreme Court
P.O. BOX 4092
Olympia, WA 98504-0929

Dear Justices of the Supreme Court:

I write to this Court regarding the Order by this Court seeking comments on proposed Court Rules, or Amendments, to existing rules proffered by the Washington Association of Criminal Defense Lawyers (WACDL).

Initially, I humbly indicate that there has been no evidence presented to suggest these extensive and intrusive new rules and amendments are even necessary. There has been nothing presented by those proposing these changes which would explain the need for any change or how and why the rules which are now in place and, have been in place for decades, need to be supplemented or amended. I believe that is critically important as we move forward with any analysis.

CrR 3.7 will clearly impede the investigative process as many individuals do not and will not agree to have their statements recorded. To place a camera into the face of a victim at a crime scene or force a grieving family to be recorded in their home as part of the rapidly changing crime scene where a family member or loved one has just been assaulted, murdered or raped is unconscionable and will stifle investigations. It would also appear to violate existing statutes and no rule can or should trump those laws that are in place to insure the rights of all citizens of this State.

This rule is an unfunded mandate which would force all investigative agencies in this state to spend scarce resources for both equipment to record these innumerable interviews and for the storage, for up to 99 years, a period of time well beyond the normal life span of the parties involved. Additionally, the form and format as well as location are not specified and made clear by these rules. At the same time, the State under the PRA, would have to have these recordings available to the public which then raises the specter of

exemption and redaction analysis, coupled with the dissemination issues under the PRA, at a huge resource cost in time and money for all law enforcement and prosecutor offices throughout the state.

CrR 3.8, another unfunded mandate, requires eyewitness and/or out-of-court identifications conducted by law enforcement to be recorded as well. Law enforcement procedure and protocols are being attacked again without a basis. Here again investigations will be compromised or could be ended because witness(es) are reluctant to be recorded. My county prosecutes an enormous number of gang related crimes and I can assure you that these rules would have an enormous chilling effect on those prosecutions, leaving victims, their families and the community worse off.

Making a bad rule worse, the remedy section of this rule contains a series of words and phrases which are not defined, are open to a vast array of interpretations and would allow the defendant the right to have expert testimony without regard to case law or other rules of this court.

CrR 3.9 As above, another new rule with enormous implications. This rule would force the exclusion of "in-court identifications" if "the perpetrator is unknown to the witness" and "there has been no prior out-of-court eyewitness identification procedure." As investigations are conducted and the various layers are added to hinder those investigations, there are clearly going to be more layers of requests for "compliance" with this rule. This would, in effect, eventually cause legal issues with a child victim who would be forced by this rule to identify repeatedly, in some out-of-court procedure, the person who assaulted them physically or sexually. A procedure which would be contrary to current case law. Victims have rights as well as defendants.

This would also be true of any other victim of a crime such as rape or assault. This rule would traumatize those victims continuously. Here too, if the rule was not complied with and a victim looked the perpetrator in the eye in court and stated they were 100% sure that was the person who committed the crime against them, that identification would be worthless. Once again, victimizing the victim by mandate of a rule is not needed.

CrR 4.7 The amendments proposed by this rule broaden this rule to an unimaginable degree. The State would be required to produce each and every note taken during the pendency of the case and would have to supply information that "tends to impeach a State's witness." This is obviously an attempt to make a rule which would address "Brady" material. However, this rule would change the foundation of that case. Brady requires disclosure of information which is "material," but this new rule would in effect overturn that case and set out a new law. The "ongoing" requirement of this rule makes this a mandate into eternity. There has been no showing of necessity for this onerous change, one that will forever change the course of criminal investigation.

CrR 4.7 (h) is completely unworkable. My office has experienced the after-effect of discovery which has been reviewed and properly redacted but still provides critical information that then is disseminated by defendants and inmates. Additionally, the repercussions of *improperly* redacted discovery going to a defendant are literally life threatening. The present rule works well, and it allows for all parties, in court, to address the

issue in a timely, safe manner which complies with the law. With all due respect, this change in law will ultimately be the cause of serious harm to some victim and/or witness.

CrR 4.7(d) This proposal allows a witness to refuse to be recorded but then allows a defendant to force the use of a cautionary jury instruction which in effect challenges the credibility of that witness. By merely disputing the statements the witness made, this rule allows the use of an instruction which would appear to contradict a bedrock principle that the court shall not comment on the evidence of a case before it. Further, there does not appear to be any mechanism controlling or policing this “dispute” which then makes it possible for a defendant to merely state he or she does not agree, thereby triggering the use of this “cautionary” instruction.

In conclusion these proposed rules and amendments have been proposed in a vacuum. There has been no evidence presented which would support a need within the trial courts for these rules and amendments. These rules and amendments will have a chilling effect on the prosecution of crimes and criminals in this State and will directly impact victim’s and witness and the citizens of this State.

The prosecutors of the state of Washington swear, under oath, that they will support the constitutions and laws of both the United States and Washington state. This oath is taken very seriously, and we stand behind that oath regarding the fair prosecution of all individuals in this State. We protect and uphold the laws for all. These rules and amendments are unneeded and burdensome. As proposed, this will cripple the criminal justice system in ways that the people of this state have not seen. At the very least, these proposed changes must be intelligently discussed, evaluated and determined to be just for all involved. No necessity or exigency has been shown to incorporate these changes and law enforcement and prosecutors will be extremely hampered in upholding the very laws that we are required to enforce and uphold.

I respectfully and humbly urge you to reject these proposed changes.

Sincerely,

A handwritten signature in black ink, reading "Joseph A. Brusic". The signature is fluid and cursive, with a long horizontal line extending from the end.

Joseph A. Brusic
Yakima County Prosecuting Attorney
Yakima, WA

Tracy, Mary

From: OFFICE RECEPTIONIST, CLERK
Sent: Tuesday, April 30, 2019 4:50 PM
To: Tracy, Mary
Subject: FW: Comments On Proposed Rule Changes
Attachments: 04302019164405.pdf

From: Joseph Brusic [mailto:josephb@co.yakima.wa.us]
Sent: Tuesday, April 30, 2019 4:49 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Subject: Comments On Proposed Rule Changes

Please see my comments on the proposed rule changes by WACDL which is due today, April 30th.

Thank you for your consideration.

Sincerely,

Joseph a. Brusic
Yakima County Prosecutor