

Tracy, Mary

From: OFFICE RECEPTIONIST, CLERK
Sent: Wednesday, April 17, 2019 11:09 AM
To: Tracy, Mary
Subject: FW: Comments on Proposed Criminal Rule Changes

From: Schirman, Kelsey [mailto:Kelsey.Schirman@kingcounty.gov]
Sent: Wednesday, April 17, 2019 11:05 AM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Subject: Comments on Proposed Criminal Rule Changes

Clerk of the Supreme Court,

I have been practicing criminal law for nine years. I have some concerns with the proposed changes to the criminal rules that are being proposed.

CrR 3.7 – Requirement of persons under investigation to be audio/visually recorded

- This proposed rule change will effectively impede police investigations. When law enforcement arrive to a scene, it is not always clear who is involved in an incident. I recently had a shooting case where that very issue arose. A shooting occurred and officers respond to a hectic scene where it was not clear who witnessed what, who was involved, and who was merely there as a bystander. The identity of the shooter and who was involved did not come to fruition until later in the investigation. Many people refused to assist in providing statements, let alone would agree to being recorded. Many of those involved at the scene were gang affiliated and/or uncooperative. Law enforcement were able to track down one witness who would speak to police and provide initial information that allowed them to conduct further investigations into who the shooter was. Eventually this witness did give a recorded statement, but under this proposed rule this person could be deemed to be 'under investigation' when he gave those initial statements, thus requiring a recording. Under the proposed rule for "Consequences," everything this witness preliminarily provided including his eyewitness account of what he saw, i.e. the shooter shooting the victim, would be presumed inadmissible. The remedy for this rule is extreme/unnecessary and keeps critical evidence from the jury.

CrR 3.8 – Recording Eyewitness Identification Procedure

- Deeming eyewitness identifications as inadmissible when not recorded will impede police investigations and not further justice. A person has a right to choose whether they are recorded. As with the recent case example above, usurping the choice of the victim/witness and demanding that all procedures be recorded can stymie an investigation and/or prevent a jury from hearing critical evidence that can shape their decision. A jury's role is to assess the credibility of a witness. This rule usurps the opportunity for jurors to make that assessment, as if an identification is not recorded, the jury will be prevented from ever hearing that testimony.
- Moreover, this rule is impractical. This rule does not specify what types of crimes this would apply to, therefore even traffic accidents would be encompassed. For example, if there is a DUI collision and law enforcement arrive on the scene and are investigating it, would a witness who pointed to the defendant as the driver of the car that collided with the victim-vehicle be suppressed? Under this new rule, if that identification is not recorded, the proposed rule would suppress it. Again, this usurps the role of the jury to assess the credibility of witnesses and to make judgment calls as to the strength and weight to give evidence.

CrR 3.9 – In-Court Eyewitness Identification

- Established Case law already adequately addresses in-court eyewitness identification. This proposed rule is unnecessary, unreasonably vague, and prevents a jury from hearing relevant evidence. Will officers be able to identify a DUI defendant if they have had no prior acquaintance with them? Will victims be able to identify a stalker they have seen outside their window several times since they have no prior 'known' relationship to them? The answer to both of these questions under this proposed rule, suggests that the answers would be 'no.' The proposed rule would prohibit those witnesses from identifying the defendant as such. This prevents a jury from hearing relevant evidence. Evidence that the jury could give its own weight to after the defendant has had an opportunity to cross-examine it.

CrR 4.7 – Redacted Discovery

- This proposed rule change, specifically related to defense being permitted to provide redacted discovery to the defendant without input from the State, raises concerns. The practical effect of this rule change would require the prosecutor to review all discovery and seek protective orders on all sensitive information prior to turning over discovery to the defense. This will delay providing discovery in most cases. It will increase the workload of the defense, prosecutor and court in having to litigate these issues. Also, the proposed list of required redactions is insufficient. It does not include all witness contact information, schools and jobs of witnesses, medical records, CPS records, photos or videos, and any depictions of actual/attempted/simulated sexual contact.

CrR 4.11 – Recording Witness Interview

- Under this proposed rule, the interviewer would not be required to tell the witness they have the opportunity to refuse to have their statement recorded. The interviewer could say they have a right to record the interview, which could mislead the witness into believing that it is required for them to agree to being recorded. In my experience, most witnesses agree to being recorded. In one particular and recent case I had a witness did refuse to consent to a recording. He had been interviewed by prior counsel previously and had already testified at the first trial; the defendant was being re-tried and the defendant had previously threatened to shoot this witness. Under this new rule, a jury would have been instructed, without knowing the procedural and factual history of the case and the defendant/witnesses relationship, that they could infer the refusal could have been because of bias and motive. This would have been an unjust result of the witness exercising his right to refuse to be recorded.

Thank you for considering my concerns.

Kelsey Schirman