Tracy, Mary

From: OFFICE RECEPTIONIST, CLERK
Sent: Wednesday, May 1, 2019 8:24 AM
To: Tracy, Mary
Subject: FW: Comments as to proposed rules CrR and CrRLJ 3.7, 3.8, 3.9, 4.7, and 4.11

From: Burke, Lauren [mailto:Lauren.Burke@kingcounty.gov]
Sent: Tuesday, April 30, 2019 5:56 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Subject: Comments as to proposed rules CrR and CrRLJ 3.7, 3.8, 3.9, 4.7, and 4.11

To Whom it May Concern,

I am writing to strongly oppose the adoption of the proposed rule changes. As written, these rules appear to be poorly thought out, in conflict with existing law, and an astonishing departure from existing criminal practice. They presuppose the credibility or lack of credibility of witnesses in a manner that undermines the entire premise of jury trials.

Rule 3.7:
The effect of rule 3.7 is to declare that law enforcement officers are inherently untrustworthy, whether or not a jury would independently find them to be so. It will impede law enforcement in investigating crime; officers do not know in advance who among those they encounter may later become a suspect, and this would require them to essentially record their entire working lives. It also would make presumptively inadmissible any statements given to non-law enforcement witnesses such as loss prevention officers, who are unlikely to be trained or given resources to comply with the rule. The requirement that refusals to be recorded be themselves recorded is unlawful under the Washington Privacy Act. Law enforcement already have strong incentives to record suspect interviews where practicable. This rule solves no problem, and only creates new ones.

Rule 3.8
Proposed rule 3.8 not only will impede law enforcement in ongoing investigation and prevention of crime, but it also invades the privacy of victims and witnesses who may wish to give a statement of identification but not have their faces recorded and potentially broadcast to the world. In combination with proposed rule 4.7(h), there is a significant risk that these recordings will be obtained by defendants and used in witness tampering or to punish victims and witnesses for speaking up by publicizing video taken in moments of extreme distress.

Rule 3.9
This rule, when combined with existing arguments that in-court identifications should be excluded where there has been a prior identification would have the effect of creating a catch-22 and making it impossible to identify any defendant in court. Law enforcement would be required to engage in time consuming and duplicative identification procedures on every criminal case. Additionally, by making in court identifications of defendants burdensome or impossible, the prosecution would be forced to establish identity through means more prejudicial to the defendant, such as with jail booking photos and fingerprints. This rule again solves no problem, and creates new ones.

Rule 4.7
Proposed rule 4.7 is an unnecessary expansion on Brady v. Maryland, and the lack of specificity as to who is considered to be acting on behalf of the State places the burden of investigating all possible defense materials onto the State rather than on defense attorneys and investigators. The lack of a materiality requirement makes this rule overbroad and unworkable. Extending the requirement for disclosure infinitely also raises questions of who would receive such ongoing

discovery and what resources would be required to continue all police investigations essentially indefinitely. The need for prosecutors to provide credible exculpatory evidence that comes into their possession after sentencing is already codified in RPC 3.8(g).

Additionally, providing discovery to defendants without outside oversight runs a serious risk of the names, contact information, and personal materials of victims and witnesses being disclosed to defendants and utilized to intimidate, tamper, or harass those victims and witnesses. On a daily basis, defense attorneys provide proposed redacted discovery packages to prosecutors with important redactions missing. It is simply not adequate or rational to hope that the practice will improve in the absence of any review or oversight.

Rule 4.11

The framework of this proposed rule creates an inappropriate pressure on victims and witnesses to consent to recording. In combination with proposed rule 4.7(h), this rule would provide another avenue for defendants to intimidate or harass victims and witnesses, whose recordings of difficult and potentially traumatic interviews they would be able to access. The requirement in the proposed rule that recordings not be disseminated is potentially requiring State agencies to violate the Public Records Act. This rule is also potentially in conflict with the Washington Privacy Act, and the proposed jury instruction on witness refusals of recording is an unconstitutional comment on the evidence.

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