Tracy, Mary

From: OFFICE RECEPTIONIST, CLERK
Sent: Thursday, April 11, 2019 3:38 PM
To: Tracy, Mary
Subject: FW: Comments on proposed court rule changes

From: Manza, Maria [mailto:Maria.Manza@kingcounty.gov]
Sent: Thursday, April 11, 2019 3:38 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Subject: Comments on proposed court rule changes

CrR 3.7:
Proposed changes will impede effective law enforcement because many individuals are reluctant to be recorded, and recording someone's refusal is a violation of the Washington Privacy Act. At the beginning of an investigation, it may not be clear who the suspect is, and requiring recording of questioning of everyone at the scene will obstruct justice. Many agencies lack resources to record and preserve the broad range of interactions affected by this proposed rule. One of the main problems with this proposed change is that it presumes unreliability when an interaction isn't recorded, and it shifts the burden away from the person trying to suppress evidence with no reason. Finally, it does not seem to be limited to law enforcement. Would this also apply to CPS, retail security, private citizens?
In regards to the proposed exceptions, the requirement of "due diligence" in maintaining equipment will result in extensive litigation and places a substantial and unreasonable burden on police agencies to establish maintenance protocol and record keeping, which will also fall on the taxpayers. The meaning of "substantial exigent circumstances" is unclear. Would it apply to traffic collision scenes, suspects in hospitals or at SCORE where video isn't available? Does it extend to an officer's belief that recording would impede a homicide investigation? What about covert operations?

The remedy of exclusion of the statement and all subsequent statements is extreme and unnecessary. The rule will keep out relevant and sometimes critical evidence from the jury when the evidence makes clear that a statement was given voluntarily. In order to admit a statement that is not recorded the rule imposes a burden on the State to prove the defendant's statement is reliable, when the probative value may be in the lies that the defendant is telling. It is an arbitrary and punitive choice to apply a standard of proof to overcome the presumption of inadmissibility that is a higher standard than applies to alleged constitutional violations.

CrR 3.8:
Proposed changes will impede law enforcement and have an incredibly negative impact on survivors of crime that may already be reluctant to participate due to fear of retaliation, including survivors of domestic violence, sexual assault, human trafficking, and gang-related violence. Their (founded) fear that the perpetrator will have access to their recordings/images and may be able to circulate them to others will chill participation. Beyond negatively impacting survivors of crime, the proposed rule is also impractical due to the lack of resources of most police agencies, and because it imposes an unreasonable burden of having to document and identify all persons who witness the procedure, where the people present are fluctuating depending on the type of scene (e.g. collision). Existing constitutional and common law standards already adequately address the issues of admissibility of identification procedures. If the rule is changed as proposed, there needs to be an exception when there is a lack of availability of recording devices.

The proposed remedies are extreme and unreasonable. It is the jury's responsibility to determine weight of evidence, and judicial comments on the evidence are unconstitutional in Washington.

Concerns Relating to Both CrR 3.7 & 3.8: The fact finder is the sole judge of credibility. Proposed CrR 3.7 and 3.8 propose something extraordinary: the suppression of constitutionally valid evidence that a jury may still find credible. CrR 3.7 and 3.8 presuppose that police lack credibility and therefore having an officer say what a defendant said (3.7) or say that a witness identified someone (3.8) are so inherently unreliable that they should be inadmissible, unless there is video proof. In essence CrR 3.7 and 3.8 say that police, because they are police, cannot satisfy hearsay exceptions (party opponent, statement of identification). This undermines the fundamental nature of our fact finding system: allowing the jury to determine credibility.

CrR 3.9:
Case law already adequately covers whether in-court identifications should be excluded, making this proposed rule unnecessary. The argument that already is made is that in-court identification should be precluded if there has been a prior identification procedure. This rule sets up a Catch-22 for the prosecution, resulting in exclusion of all in-court identifications. This new rule apparently would apply to law enforcement witnesses, which would preclude prosecution of most traffic-related crimes (from DUI to vehicular homicide) unless the officer was previously acquainted with the defendant or was presented with a photographic montage – or perhaps the officer could do his or her own show-up? 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 (bloody, weapon-wielding man caught leaving victim's home), or in-court identification would not be permitted. The term "unknown" is unreasonably vague. Must the witness know the perpetrator's name or be socially acquainted? Is an unnamed stalker "unknown"? The lack of a clear standard will force law enforcement to conduct unnecessary identification procedures because of the possibility that the court will interpret the term broadly. If the court precludes an in-court identification under this rule, in the interest of truth, the jury must be informed that the court has prevented that, so that the jury will not draw any inferences against the prosecution based on the failure to do so. This prevents the jury from hearing relevant evidence. The weight of that evidence is properly developed through cross-examination and determined by the jury, not an arbitrary bright-line rule.

CrR 4.7:
It is unreasonable to require the State to disclose evidence of which it is unaware when that evidence is known only to a witness or another civilian. While the Brady obligation extends to evidence known to law enforcement directly involved in an investigation, it certainly does not extend to civilians who are not State agents. If the proposed amendment is not intended to expand the Brady rule, then it is entirely unnecessary. The amendment requires disclosure of all evidence that "tends to impeach" any State witness, without limiting that obligation to material evidence. After sentencing, RPC 3.8(g) requires 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." That is a reasonable post-sentencing obligation. The much broader requirements of this proposed rule are unnecessary and unreasonable.

The proposed changes to regulation of discovery are particularly concerning when it comes to public safety and cooperation with the justice system. In order to protect the safety and privacy of victims and witnesses, prosecutors will have to review all discovery before providing it to defense to move for protective orders preventing release of sensitive information to the defendant. This will delay providing discovery to the defense in most cases and increase the workload of all parties and the courts as the requests for protective orders are litigated. The list of necessary redactions is obviously insufficient. Redactions that currently are required by prosecutors include the following: all contact information for all potential witnesses, including email; schools attended by witnesses; job locations and employers of witnesses; medical records; mental health and counseling records; CPS records; photos or video (including on a digital device, or in an electronic file) with images of any part of any person or animal; and any description or depictions of actual, attempted, or simulated sexual contact. Defense counsel is always permitted to review these items with the defendant, but it is obvious that putting copies of this material (including autopsy photos, photos of injured victims, 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 material. There is no effective remedy if the defendant is provided with incompletely redacted discovery, so eliminating review by the prosecutor is contrary to the community's interest in public safety.

CrR 4.11:

Pursuant to RCW 7.69.010, victims and witnesses in criminal cases are to 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." The proposed change effectively allows attorneys to mislead or intimidate witnesses who are reluctant to be recorded. The dissemination requirements are inconsistent with the Public Records Act, unreasonably prohibit use of the transcript to impeach a witness in a different case, and allow unrestricted disclosure to defendants, which is an invasion of privacy.

In regards to witness consent to be recorded, the jury determines the credibility of witnesses and is already informed if a witness has refused to be recorded and is instructed to consider any relevant circumstances in judging credibility, to which the defense may argue that the refusal is relevant. The only additional effect of this rule is to coerce the witness to be recorded and to invite a judicial comment on the witness's credibility – both are improper purposes for a court rule.

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