



Lewis County Prosecuting Attorney's Office

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March 1, 2019

Ms. Susan L. Carlson, Clerk
Washington State Supreme Court
P.O. Box 40929
Olympia, WA 98504-0929
Email: supreme@courts.wa.gov

RE: Proposed Amendments to the Criminal Rules

Dear Ms. Carlson:

This letter is to provide comment and express concern regarding the WACDL proposed amendments to the Superior Court and corresponding Courts of Limited Jurisdiction Criminal Court Rules. The proposed rules go beyond the intentions of discovery, violate the Washington State Privacy Act, violate victims' constitutional rights, require the implementation of unfunded mandates, and other far reaching implications which are beyond the scope of court rules. The Lewis County Prosecutor's Office is therefore opposed to the amendments of the court rules submitted by WACDL as published for comment by this Court.

CrR 3.7/CrRLJ 3.7: This rule encompasses every encounter every citizen has when a law enforcement officer is investigating a possible crime. Investigations by law enforcement officers are dynamic. This rule would require constant recording of all interactions of all persons because they may become the subject of a criminal investigation once the law enforcement officer has finished speaking to the parties. Most police agencies in Washington State do not have the resources to record and preserve the broad range of interactions that fall within this rule. This rule is an unfunded mandate upon police agencies for equipment and manpower. The rule also presumes any statement taken out of compliance with the rule is untrustworthy and unreliable, it presumes the State's witnesses are unreliable, and it removes from the finder of fact the right to judge and weigh credibility. The requirement to record a person's refusal to be recorded is impractical and it also violates a person's rights under the Washington Privacy Act. Finally, the consequence for violating the rule is presumed inadmissibility in any criminal proceeding. The only way to overcome this violation is by clear and convincing evidence the statement was voluntarily given and is reliable based on a totality of the circumstances. This remedy is unnecessary, extreme, and keeps out relevant and sometimes critical evidence from the jury, even when the statements were clearly voluntarily given. The standard of proof required to

It is the Mission of the Lewis County Prosecutor's Office to zealously seek justice in all criminal matters, consistently promote public confidence in the legal system, and diligently represent county government while adhering to the highest ethical and moral standards

overcome the presumption of inadmissibility is a higher standard than applies to alleged constitutional violations, this is arbitrary and punitive.

CrR 3.8/CrRLJ 3.8: Many witnesses are intimidated by eyewitness identification procedures. The lack of guidance for what constitutes "when practicable" is also troubling. If a witness refuses to be visually and audibly recorded, will that suffice as not "practicable"? The requirement to identify any individual whom the witness has spoken to prior, during, or immediately after the official identification procedure regarding the identification is particularly troubling. What if we are dealing with a possible case that is many years old and conducting a photo montage? Is law enforcement actually supposed to figure out every person previously spoken to about the identification and a detailed summary of what was said? In many instances, where identification are not conducted immediately after a crime occurs this simply will not be possible. The remedy of suppression is overly harsh. The defense is currently able to argue improper procedures, the weight of the evidence based upon how the eyewitness identification was conducted, and appropriate jury instructions to aid in their arguments. This is sufficient to alert juries to potential issues in regards to the identification procedures that were used in a particular case.

CrR 3.9/CrRLJ 3.9: This rule would bar the in court identification of all defendants by law enforcement officers barring the procedures set forth in CrR 3.8/CrRLJ 3.8. It would be nearly impossible to prosecute traffic offenses, in particular DUI, Reckless Driving, and Attempting to Elude. Similar issue would occur in the prosecution of possession offenses such as Unlawful Possession of a Controlled Substance and Unlawful Possession of a Firearm. An officer would never be able to get on the witness stand and identify the defendant as the person he or she arrested. Leaving the defense to argue to the jury, "How do you know my client is even the person the officer arrested? Did you hear the officer get up there on the witness stand and identify my client as the person he/she had contact with that night? No."

CrR 4.7/CrRLJ 4.7: In regards (a)(3)-(4), this proposal purports to codify *Brady v. Maryland*, and the State's obligations required under the body of law stemming from *Brady*. Yet, the State's requirements pursuant to *Brady* are limited to material information. Broadening the State's requirement to disclose any information which tends to impeach the State's witnesses is unreasonably burdensome. The State would be required to continually do background checks of those that may be potential witnesses to determine if any new material has come up that must be disclosed. This burden takes on a new radical expansion under subsection (4) by striking the materiality requirement and requiring the State to disclose evidence that is material, favorable, or impeaching, and known to the State or others acting on the State's behalf. The duty is then imposed as an ongoing duty after the plea or sentencing. No case law requires such a duty. 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 an offense which the defendant was convicted." If there is an ongoing post-conviction action, the State has a continuing obligation for disclosure. *State v. Riofta*, 134 Wn. App. 669, 689, 142 P.3d 193 (2006).

In regards to (h), the proposal does not acknowledge the need for oversight in regards to redactions and the issues regarding witness tampering and intimidation that can occur. Further, the list of redactions required in this rule are not sufficient, it makes no requirement to redact sexual content, medical records, mental health records, email information, CPS records, and the release of autopsy photographs.

CrR 4.11/CrRLJ 4.11: This rule is a violation of Article I, Section 35 of the Washington State Constitution. This rule coerces victims and witnesses to agree to recordings. The Washington State Constitution requires crime victims be afforded dignity and respect. This rule punishes victims for refusing to be recorded by calling into question their reasons for refusal via a jury instruction, demanding the jury examine their reason for refusal to be recorded, including possible bias and motive. This is an impermissible judicial comment on the evidence. The jury is already instructed on how to evaluate witness credibility. The rule also does not require a person to be informed of their right to refuse to consent to the recording of the interview.

The Superior Court Criminal Rules and the Criminal Rules for Courts of Limited Jurisdiction "are intended to provide for the just determination of every criminal proceeding. They shall be construed to secure simplicity in procedure, fairness in administration, effective justice, and the elimination of unjustifiable expense and delay." CrR 1.2; CrRLJ 1.2. It is impossible to envision how WACDL's proposed amendments embody the purpose and construction of these rules. The proposed rules arm advocates on one side of the isle with procedures that are weaponized, cumbersome, and require expansive resources without sufficient funding.

For the reasons outlined above, the Lewis County Prosecutor's Office respectfully request the proposed amendments be rejected.

Respectfully,



Sara I. Beigh
WSBA No. 35564
Senior Deputy Prosecuting Attorney

Tracy, Mary

From: OFFICE RECEPTIONIST, CLERK
Sent: Friday, March 1, 2019 2:39 PM
To: Tracy, Mary
Subject: FW: Comment on Proposed Court Rules
Attachments: Proposed Amendments CrR 2019 Comments.pdf

For you. ☺

From: Sara Beigh [mailto:Sara.Beigh@lewiscountywa.gov]
Sent: Friday, March 1, 2019 2:38 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Subject: Comment on Proposed Court Rules

Ms. Carlson,

Attached is my letter for comment regarding WACDLs proposed amendments to the Criminal Rules.

Respectfully,

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