WASHINGTON
COUNCIL
OF
POLICE &
SHERIFFS

March 21, 2019

Washington State Supreme Court
P.O. Box 40929
Olympia, WA 98504-0929

DELIVERED VIA EMAIL

To the Washington State Supreme Court,

The Washington Council of Police and Sheriffs (WACOPS) is the largest and oldest organization representing law enforcement professions in Washington State. Our membership is made up of law enforcement collective bargaining units from across the State. We also have Associate members that are Deputy Prosecuting Attorneys in this State. Thank you for considering our input regarding the proposed court rule changes. Our membership, almost 4,400 law enforcement professionals, and are deeply troubled by the rules as proposed.

There are multiple issues with the proposed court rule changes that significantly impact and interfere with law enforcement, evidence gathering, the truth finding function of law enforcement, and the ability to properly prosecute individuals suspected or charged with crimes.

The proposed rules under 3.7, 3.8, 3.9, 4.7 and 4.11 (both CrR and CrRLJ) all appear to be outside the proper scope and purpose of court rules. Court rules generally govern the procedure in the courts and should not usurp or supplement a legislatively enacted statutory scheme. These proposed rules create substantive tests, establish legal burdens, and invade the providence of the jury. Such changes are outside the jurisdiction of the court, as under the separation of powers, it is the legislative branch which has the power to enact rules of evidence and procedure that guide the admissibility of evidence.

More specifically, the proposed rule changes are impracticable, unnecessary and any substantive changes must go through the proper legislative procedures. They are proposed by a defense attorney for the sole purpose of frustrating justice, not furthering it.

The following are some examples of the issues, WACOPS see with the proposed rules.

3.7

Proposed rule 3.7 states it will "improve the reliability of interrogation evidence." All parties are interested in the reliability of evidence. However, audiovisual recording is not the only factor that finders of fact should consider at the exclusion of all others. If it were, circumstantial evidence would have no business in a fact determination. The purposed rules given unnecessary weight to recordings or the lack of recordings. Reliability should be determined in conjunction with the already existing Rules of Evidence and judicial opinions. Rules 3.5 and 3.6 do not include such presumptions and burden-shifting language in dealing with confessions and suppression. The mechanisms in these proposed rule changes go beyond the procedural direction that Rules 3.5 and 3.6 established in addressing important constitutional aspects. It is contrary to established jury instructions and years of jurisprudence.

Further, the practicality of this rule change will handicap all investigations. Under the proposed changes, an investigator must record, or at least, request to record any questioning of a suspect or witness. This flies in the face of Washington's two-party consent rule, requiring an officer to violate it to confirm the person does not want to give their consent. Recording, particularly audiovisual recording, may be intimidating to some suspects or witnesses, and requiring an investigator to ask for their permission on film is even more so. The effect on criminal investigations could be devasting. Intimidating witnesses and suspects is not going to improve reliability, and indeed has the potential to hinder investigations and prevent adequate truth seeking and fact-finding. The result of this rule would be the exclusion of relevant and admissible evidence. Excluding relevant and admissible evidence does not help to improve the reliability of evidence, rather it frustrates this goal.

Some witnesses and suspects may not wish to be recorded for reasons that have nothing to do with reliability. They may have personal, religious, or other reasons. The proposed rules do not contemplate this situation. If this rule where adopted, the Court would be saying that witnesses and victims who do not wish to be recorded will not have their case brought forward to the Court. This is discriminatory and frustrates the goals of justice.

In addition, the preservation part of this rule is arbitrary. Some recordings are kept for one length of time and others must be kept for 99 years. No explanation is given as to why. In other cases, the recordings must be kept until prosecution is barred. In the case of murder, there is no statute of limitations. Who is responsible for keeping those recordings? Are these recordings subject to public disclosure? Law enforcement agencies do not have the budget to comply with this rule.

To the extent the rule change proposes to require body-cam evidence for every suspect statement, such a rule change is overly broad and hampers non-traditional, but otherwise valid law enforcement officers, whose agencies do not otherwise have the budgets, resources, or need to require body cameras of their investigative staff.

Finally, this proposed rule change will generate several collateral issues that the review committee must consider. There may be times where law enforcement must interview people in hospitals. Privacy issues and HIPAA laws may prohibit or limit the viability of recording. All these consequences should be evaluated by the legislature. This proposed rule excludes access to justice and law enforcement.

3.8

The supposed purpose of the rule is to improve the reliability of eyewitness identification evidence by recording the eyewitness identification procedure, thereby allowing for subsequent review. Again, the proposed change provides a solution to a problem that does not exist. The jury is to determine credibility of the witnesses and evidence. They are given an instruction to that effect. The proposed rules invade the jury's ability to decide and mandates decision-making criteria to them. Existing rules of evidence provide remedies in these matters. In short, these issues go to weight not admissibility.

It is for the jury to determine the veracity of the identification and for the defense bar to point out inconsistencies in the identification process. This rules also requires the witness to be recorded. This could have a chilling effect on witnesses willing to participate in the process.

3.9

Witnesses can testify about personal experience. If they identify the defendant as the person that they observed commit a crime, they should not be barred just because they do not have a prior relationship with the person. Under the proposed rule, a witness or victim may not want to be recorded and therefore a prior identification could not happen. Now they would also be barred from testifying about what they personally observed. This again goes to weight not admissibility. It is interesting that this rule only applies if the witness is going to identify the defendant. How does any party know this prior to the witness testifying? If the witness does not identify the defendant, which happens, is that also precluded by this rule? This rule again seeks to frustrate justice and exclude those who get access to the system. Only those that are recorded get access.

4.7

General discovery obligations already require proposed section (a)(2)(iv). Further remedies are available at the trial court for violations of the general discovery rules. This proposed section serves no legitimate purpose. Section (a)(3) is already a requirement of prosecutors under case law and the rules of professional conduct. Defense is under no such obligation.

The proposed section (a)(4) places the burden on the prosecuting attorney to control other independent entities. This proposed rule is unworkable, and it imposes a duty to search for the unknowable.

Further, proposed section (h)(3) is dangerous to victims and witnesses. The only logical outcome to this proposed rule, other than putting witnesses and victims unnecessarily in harm's way, is to decrease the number of witnesses and victims that are willing to come forward and testify. As a trial court, the goal should be to include as many witnesses as possible to help the finder of fact make their own determination as to the truth within the rules of evidence.

4.11

The proposed rule 4.11 does not appear to add any significant abilities or mandates. Instead, it appears its only intent is to instruct the jury to "examine a statement carefully." This adds suspicion to a statement because the witness did not wish to be recorded. Such determinations of credibility are for the jury alone to decide using their own judgment of the veracity and reliability of a witness. The proposed rule hinders the jurors by taking away their ability to fairly evaluate a witness based on the entirety of the circumstances.

WACOPS is unaware of studies or rulings that support the proposition that a recorded witness's statement is more trustworthy than an unrecorded statement. The proposed rule does not require witness advisement of their right to refuse recording. Witnesses have a right to refuse recording and examining a statement more carefully simply due to a witness' exercise of this right is improper. In fact, case law has clearly set forth the opposite if someone invokes his or her rights.

When a suspect invokes their Fifth Amendment right to remain silent, prevention of their invocation's exposure to the jury is paramount. This instruction seems to come to a different conclusion when it instructs a jury to "eye" a witness with suspicion for not wanting to make a recording of an interview, which is their right.

Many law enforcement officers work undercover. For several reasons, most importantly being safety, they would not want recordings of their voice in the hands of defendants and defense attorneys.

This rule ignores valid reasons why witnesses and victims may wish, as is their right, not to be recorded.

In summary, none of these proposed rules actually accomplish their stated goal of improving reliability. All these proposed rules do is frustrate the system, cause delays, and limit whom has access to the system. Therefore, WACOPS opposes these proposed changes and asks the Court to reject them.

Thank you for your kind consideration. The content of this letter was gathered through member input. If you have any questions, please let me know and I will be happy to facilitate finding the answers.

Sincerely,

Teresa C Taylor

Teresa C Taylor
Executive Director

Tracy, Mary

From: Hinchcliffe, Shannon
Sent: Friday, March 22, 2019 9:16 AM
To: Tracy, Mary
Cc: Jennings, Cindy
Subject: FW: Proposed Court Rule Changes
Attachments: Supreme Court Rules 3-21-19.pdf

Mary,

I think they meant to send this letter to the court address. Forwarding to you for publication in case you did not receive it.

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From: Teresa Taylor [mailto:TTaylor@wacops.org]
Sent: Thursday, March 21, 2019 4:54 PM
To: AOC DL - Rules Comments <RulesComments@courts.wa.gov>
Subject: Proposed Court Rule Changes

Please find attached a letter of comment regarding the proposed court rule changes. On behalf of WACOPS and its 4,400 members we are strongly opposed to the rules as drafted and ask that you not adopt.

Teresa C Taylor
Executive Director

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www.wacops.org