Tracy, Mary

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

From: Masters, TinaMarie [mailto:tinamarie.masters@kingcounty.gov]
Sent: Tuesday, April 30, 2019 7:15 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Subject: Comments to proposed rules 3.7, 3.8, 3.8, 4.7 and 4.11

To Whom it May Concern:

I am a deputy prosecuting attorney in the Criminal Division of the King County Prosecutor's Office. I am writing to note my objection to the proposed changes to the criminal rules. The proposed rule changes are drastic, and they would only serve to endanger and demean victims and witnesses. The following are some of my concerns:

CrR 3.7: Proposed CrR 3.7 will impede effective law enforcement because many individuals are reluctant to be recorded. Requiring them to be recorded will decrease cooperation with police. It is illogical and a violation of the Washington Privacy Act to record the refusal of a person who refuses to be recorded. At the beginning of an investigation, almost everyone is under investigation and requiring audio-visual recording of the questioning of everyone at the scene of a violent crime will obstruct justice, as many will be reluctant to speak when video recorded. Proposed CrR 3.7 appears to be predicated on a belief that police are inherently untrustworthy and cannot be taken at their word. The credibility of witnesses is a matter for the judge or jury to decide after hearing all of the evidence.

CrR 3.8: With respect to DV victims, human trafficking victims, and any victim of a violent crime or gang-related violence, they will fear retaliation because they will anticipate (accurately) that their assailant will have access to the recording and their image may be circulated to associates of the defendant for purposes of retaliation. This rule will result in intimidation of victims (and witnesses) of violent crimes when recordings of them making an identification are circulated by the defendant. It is important to note that the recordings will be available under the Public Records Act upon the filing of charges.

CrR 3.9: Determination of whether an in-court identification procedure should be excluded is already adequately covered by case law – a more restrictive rule is unnecessary. The argument that already is made is that in-court identification should be precluded if there has been a prior identification procedure. This new rule 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. Proposed CrR 3.9 codifies an unsupported conclusion that in-court identifications are all unreliable. 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.

CrR 4.7: The proposed change to the State's discovery obligations broadens what is required under the Brady v. Maryland body of cases and requires prosecutors to provide any "favorable evidence known to others acting on the State's behalf and is an "ongoing" requirement even after plea and sentencing. People who are acting on the State's behalf include not only law enforcement, but also State's witnesses. This would require the State to be aware of every piece of information any lay witness knows about a defendant. This would be hard enough prior to disposition of a case

but after disposition, the State cannot be expected to be aware of every piece of information any witness may know about a defendant. Further, it is not required
by the constitution.

CrR 4.11: The people of this State intend that victims and witnesses in criminal cases 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." RCW 7.69.010. This proposed rule effectively allows attorneys to mislead or intimidate witnesses who are reluctant to be recorded, which is inconsistent with this most basic principle of justice. The vast majority of witnesses already agree to recording of interviews by the parties. In the rare instances when a witness is reluctant to be recorded, there are likely to be good reasons for that related to the subject matter (e.g. sexual assault) or because of their fear of the defendant. Coercing such a witness to be interviewed (by a negative jury instruction if they refuse) is simply offensive. The proposed rule coerces the witness to agree to recording, by failing to inform them of the right to refuse and by punishing refusal. It is likely to result in some witnesses refusing to further cooperate with prosecution, defeating the interests of justice and reducing community safety.

Thank you for your time and consideration.

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