Tracy, Mary

From: OFFICE RECEPTIONIST, CLERK
Sent: Tuesday, April 30, 2019 4:29 PM
To: Tracy, Mary
Subject: FW: Comments to Suggested Criminal Rule Changes

From: Doyle, William [mailto:William.Doyle@kingcounty.gov]
Sent: Tuesday, April 30, 2019 4:29 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Subject: Comments to Suggested Criminal Rule Changes

All,

I am writing to express concerns regarding the proposed criminal rule changes. I address some of these concerns below, which I believe echo concerns previously expressed by other prosecutors:

Note as to both proposed CrR 3.7 and 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. This undermines the fundamental nature of our fact finding system: allowing the jury to determine credibility.

CrR 3.7 RECORDING INTERROGATIONS

(a) <u>Custodial and non-custodial interrogations</u> . . .

- 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 could be considered 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. The rule does not take into account that a person may first appear to be only a witness, but later become a suspect.
- The rule encompasses every encounter with a potential suspect, no matter how casual or innocuous, on the scene, on the street, at their home, in a vehicle, or at any other location.

CrR 3.8 RECORDING EYEWITNESS IDENTIFICATION PROCEDURE

- Proposed CrR 3.8 will impede effective law enforcement, because many individuals are reluctant to be recorded. 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.

- The rule will result in intimidation of victims (and witnesses) of violent crimes when recordings of them making an identification are circulated by the defendant. The recordings will be available under the Public Records Act upon the filing of charges.
- How does it further justice to bar evidence of identification procedures rather than allow the jury to determine the weight of the evidence, which is tested by cross-examination?
- Existing constitutional and common law standards adequately address the issue of admissibility of identification procedures.

CrR 3.9 IN-COURT EYEWITNESS IDENTIFICATION

- 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 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?
- 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.
- 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.

CrR 4.7 DISCOVERY

(h) Regulation of discovery.

- Under this amendment, defense counsel does not have to provide notice to the State before giving discovery to the defendant. Thus, in order to protect the safety and privacy of victims and witnesses, prosecutors will have to review all discovery before providing it to the defense, to be able 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 insufficient. Redactions that currently are required by prosecutors as a general rule also 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.

- It has been the experience of prosecutors that defense counsel often do not properly redact discovery that they have submitted to the prosecutor for approval before providing it to the defendant, pursuant to the current rule. It poses unnecessary risks to the safety and privacy of victims and witnesses to eliminate this second set of eyes reviewing the redactions.
- There will be no incentive for defense counsel to carefully redact the discovery, as there is no penalty for failure to do so.
- There is no effective remedy if the defendant is provided with incompletely redacted discovery.

CrR 4.11 RECORDING WITNESS INTERVIEW

(a)

- 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.

(b) Providing Copies.

- The limitation on dissemination of recordings is inconsistent with the requirements of the Public Records Act, which will require disclosure upon request.
- The limitation on dissemination to the current case only unreasonably prohibits use of the transcript of an interview to impeach a witness in a different case, whether that case involves the same incident (an accomplice), a related incident, or a completely different case. For example, the statements of an expert witness in one case are often relevant to their testimony in other cases involving the same subject.
- The rule allows unrestricted disclosure of a recording of a witness interview to the defendant or associates of the defendant if defense counsel decides it is reasonably necessary to the defense. This is an invasion of privacy and creates a risk to public safety, where the questions that may be asked during an interview are virtually unlimited, and may include personal questions on subjects that are inadmissible at trial.

(c) Preliminary Statement.

- The proposed rule does not require that victims or witnesses be informed of their option to refuse to consent to the recording of an interview.

(d) <u>Witness Consent</u>.

- The rule invites a court to craft a jury instruction "to examine the statement carefully," inviting a comment on the credibility of a particular witness without giving any real direction to the trial court.
- It is inappropriate to use a person's right to refuse to be recorded against them.
- It is inappropriate for a jury in a criminal case to be directed to determine the legitimacy of a person's refusal to be recorded, which is that person's right.
- If a jury is to be instructed to consider the reasons for the refusal, which it must be in order to evaluate its legitimacy, it must be permitted to hear of the prior bad acts (including threats and intimidation) of the defendant and the character of his or her associates to evaluate the witness's fear of retaliation. The witness's subjective fears, even if not based on verifiable facts, also should be considered by the jury in order to fairly evaluate the reason for the refusal. The rule should specify that if the victim is not permitted to explain the refusal in full, no instruction should be given.

- There is no compelling reason to infer bias from the refusal to be recorded.

Thank you.

William Doyle
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