Kittitas County Prosecuting Attorney

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Our Mission:
Seeking Justice; Serving Victims, and
Holding Offenders Accountable

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Supreme Court of Washington
Office of the Clerk of the Court
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This letter is in response to the Order of the Court dated July 11, 2018 seeking comments on certain proposed Court Rules or Amendments to Court rules put forward by the Washington Association of Criminal Defense Lawyers (WACDL).

WACDL has suggested a collection of additions to the Washington Criminal Discovery rules. The proposals are expensive to implement, do not serve any purpose that will actually protect the rights of the accused; appear to have been designed to impede prosecution and to harass and inconvenience victims and witnesses with no improvement in the trustworthiness of verdicts. There has been no public debate about any need for these additions and changes, nor has any evidence been presented that the proposals address actual problems. There is also no evidence that the proposals will actually have a measureable impact on any problems, if those problems in fact exist.

CrR 3.7/CrRLJ 3.7: The first is a proposal that would require that all "interrogations", both custodial and non-custodial, of persons under investigation for any crime to be recorded by an audiovisual device, electronic or digital. The first obvious flaw is that this would probably require all officers, regardless of assignment, to have a body-worn camera (BWC) to address those interviews conducted outside of a law enforcement facility. There is not a real consensus about the value of officers having body cameras. There are very good reason not to have them, including: the cost of the equipment and storage; the inconsistency between having BWC footage to test for the use of force under both *Graham v. Connor* and statutory and common law provisions; and the lack of proven utility. Further, there is no definition of "persons under investigation for any crime", which by necessary implication would both involve efforts to exclude some potential suspects and also likely require *Terry* encounters to be taped, to the detriment of the privacy interests of those subsequently cleared. The proposed rule is also not limited to actual law enforcement personnel. It would apply to retail security and other similar personnel, could apply to Child Protective Services and Adult Protective Services personnel, and cannot be reconciled with *State v. Heritage*, 152 Wn. 210, 217-219 (2004).

In addition, since a non-custodial interview does not require *Miranda* warnings, this also appears to be a back door means of reviving a concept long dead in Washington law pertaining to out of

custody interviews and being the possible focus of a criminal investigation. *Heinemann v. Whitman Wash. Dist. Court*, 105 Wn. 2d 796 (1986); *State v. Short*, 113 Wn. 2d 35, 40-41 (1989), citing *Berkemer v. McCarty*, 468 U.S. 420, 440 (1984), rejecting *State v. Dictado*, 102 Wn. 2d 277 (1984). Appellate analysis of our due process clause shows that even with an analysis reflecting *Gunwall*, there is no difference between the state and federal due process clauses, and that there has been no showing that such recordings are required as a result of law enforcement conduct. *State v. Turner*, 145 Wn. App. 899 (2008). The legislature has also considered the issue, and provided for a process by which recordings may be made of persons who are under arrest. RCW 9.73.090(1)(b). No authority supports this amendment, and it does not address any known flaw in the manner in which those suspected or accused of crimes have been interviewed. The proposal also denigrates the ability of the judicial finder of fact in a suppression hearing to consider the witnesses and their credibility. Given that under CrR 3.5, the burden of showing admissibility of any statement is on the prosecution, the only portion of this proposal that is not a radical departure from established law is this one, and even then, the burden of proof is changed. Given that under CrR 3.5(d)(1) and(4) as it stands, a defendant can still raise the issue of voluntariness and the jury is to be instructed on that issue, this new rule serves no necessary purpose.

CrR 3.8/CrRJL 3.8: The second proposal would require eyewitness identifications to be recorded. Interestingly, this proposal does not have the same mandate for audio-video recording, and allows for impossibility. This is not consistent with the technology that would be forced to be used by proposed CrR 3.7, even though the circumstances would likely be the same in the vast majority of cases. If not possible, then the written report should be made immediately. The imprecision in referring to the person doing the identification procedure as "the administrator", is substantial. While one could possibly interpret the usage to mean "one who administers the identification process", similar to one who *conducts* the process, it is not a common or accepted use. None of the meanings, definitions or usages shown by a commonly used on-line dictionary are consistent with this use. *https://www.merriam-webster.com/dictionary/administrator*, last accessed on August 2, 2018.

The report and confidence statement provisions are consistent with current law enforcement practice, and it is generally considered best practice to complete a report as soon as possible after the event. However, there are events that can render that difficult or impossible, including the complexity of the matter, agency resources, and the like. To then make the identification inadmissible is simply too rigid. To the limited extent that there may be any flaws in current identification processes, there is little if any evidence to show that law enforcement is the source of such flaws. There are also adequate protections provided by cross examination, if defense counsel actually does their job. The remedies suggested are also within the options now available to a trial court.

CrR 3.9/CrRLJ 3.9: Does this proposed rule address an actual problem or event? If the witness is not generally able to identify the accused, how would the identification survive scrutiny under ERs 402, 403, and/or 602? The rule appears to be directed at a circumstance that should never happen at all.

CrR 4.7/CrRLJ 4.7: As to (a)(2)(iv), law enforcement is expected to provide this to a prosecutor as part of the reports. Incidents of rather poor compliance with the general discovery obligation have occurred in which portions of reports have not been properly provided. These are usually those subsequent to the initial provision of reports to the prosecutor. However, there are ample

remedies already available to a trial court, and the proposed rule serves no legitimate or effective purpose. Likewise, as to the proposed amendment to (a)(3) – we do in fact have that obligation under the case law and as I recall it could also be an RPC violation to fail to do so. However, I do not see a reciprocal obligation on the part of the defense.

(a)(4) is simply unworkable. Prosecutors such as our office have policies based on the materials from WAPA (Washington Association of Prosecuting Attorneys), and we have provided training on those. However, we do not as a matter of law have such control over LE agencies – they are independent executive entities, and even in the case of a county SO, we can advise, but cannot coerce. What is being sought here is the measurement and proving of the unknowable, followed by a duty to search for the unknown.

(h)(3) is ill-advised. We have seen examples of counsel not complying with their obligations under the existing provision, and the proposed amendment is even worse. There is a case made known to prosecutors across the State in which serious misconduct occurred; defense counsel was completely unabashed in their defiance of the rule and the RPCs. Their claim that compliance was too inconvenient and other statements during the hearing make it seem that this is common practice. (*State v. Erick Chapmon*, Pierce County cause # 17-1-01431-3; motion filed 3/20/18; hearing 4/6/18; findings entered 5/15/18.) RPCs 3.4(c), 8.4(d) and (j) were probably violated, and under some circumstances, it is possible that RCWs 9A.72.110 or .120 could be violated under unusual circumstances. There is no benefit to the system in making these amendments, and the risks to victims and witnesses of various forms of abuse, including physical assaults, are not acceptable.

CrR 4.11/CrRLJ 4.11: The language at the beginning of the proposed rule is permissive: "... may conduct witness interviews by openly using ..." some means of verbatim recording. This proposal appears intended to overcome the provisions of CrR 4.6, which limit the taking of depositions to specific circumstances: unavailability for trial or a hearing; a refusal of a witness to discuss the case with either counsel and the witness' testimony is "material and necessary", or where there is good cause shown. The first circumstance is unremarkable; the second impedes the ability of parties to prepare for trial, and the third requires a motion and a subsequent finding by the court. These criteria protect witnesses from undue harassment and burden. The proposed language is also inconsistent with, and appears to be an attempt to overrule by rule, the results in *State v. Mankin*, 158 Wn. App. 111, 121-125 (2010) and *Dillon v. Seattle Deposition Reporters, LLC*, 179 Wn. App. 21, 58-64 (2014). One should note that the conduct in *Dillon* was considered to have been at least potentially a violation of RPC 4.1(a) by the Federal District Court judge hearing the underlying case. *Dillon*, at 55.

As such, this proposed rule completely changes the law, and has the effect of removing these important protections. The rule purports to allow the witness to refuse to be recorded, but the effect of that refusal may result in negative jury instructions with regard to the credibility of the witness. Since witnesses may have many valid reasons for not wanting to be recorded, the instructions cannot be justified. There was at least one relatively high profile case in Washington this decade in which the abuse of the witnesses was deliberate and resulted in their loss of willingness to participate in prosecution. This rule will re-victimize at least some victims, and as written would also result in having what appears to be a negative impact on the protocols developed as best practices for investigating suspected sex crimes against minors.

Summary: In conclusion, these proposed rules serve no legitimate purpose. They have been put forth with no evidence to support any legitimate need for these rules to address any actual flaw. To the contrary, they appear to have been deliberately crafted with the goals of burdening law enforcement and prosecution and causing a lack of citizen confidence and cooperation. The Court should summarily deny the proposal.

This letter is sent as a response of all of the attorneys of this office:

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Chief Civil Deputy Prosecuting Attorney Neil A. Caulkins, #31759
Chief Administrative Deputy Prosecuting Attorney Paul R. Sander, #35250
Deputy Prosecuting Attorney Christopher E. Horner, #42152
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Sincerely,

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