

Tracy, Mary

From: OFFICE RECEPTIONIST, CLERK
Sent: Monday, August 20, 2018 2:13 PM
To: Tracy, Mary
Subject: FW: Comment on proposed rules CrR 3.7 and CrRLJ 3.7
Attachments: CrR 3.7suggested.pdf; CrRLJ 3.7-suggested.pdf

From: Terry Bloor [mailto:Terry.Bloor@co.benton.wa.us]
Sent: Monday, August 20, 2018 1:22 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Subject: Comment on proposed rules CrR 3.7 and CrRLJ 3.7

The proposed rules change significantly the determination of when a defendant's statements are admissible.

The general rule has been that a suspect's custodial statement to the police is admissible if *Miranda* rights were given and the statement is voluntary. The proposed rules add a requirement of audiovisual—not just audio—recording, and extend the requirement to non-custodial interrogations. The proposed rules also impose an additional requirement of reliability by requiring that, if a recording was not made, the presumption of inadmissibility may be overcome by clear and convincing evidence that the statement was voluntary and is reliable.

I am unaware of any court in the country adding to *Miranda* and its progeny a requirement that a suspect's statement be audio-visually recorded, that a non-custodial statement must be audio-visually recorded (what about telephone interviews?) or that a defendant's statement must be shown to be voluntary and reliable before it is admitted in the prosecution's case.

Terry J. Bloor, *Chief Deputy, Criminal*
Benton County Prosecuting Attorney
7122 West Okanogan Place, Bldg. "A"
Kennewick WA 99336
PH: 509.735.3591
FAX: 509.736.3066
EM: terry.bloor@co.benton.wa.us

1 **SUGGESTED NEW CRIMINAL RULE CrR 3.7**

2 **CrR 3.7 RECORDING INTERROGATIONS**

3 (a) Recording Interrogations. Custodial and non-custodial interrogations of
4 persons under investigation for any crime are to be recorded by an audiovisual recording
5 made by use of an electronic or digital audiovisual device.

6 **(b) Exceptions.**

7 (1) A spontaneous statement not made in response to a question;

8 (2) The person requests prior to making the statement that an electronic recording
9 not be made, and the request is electronically recorded;

10 (3) Malfunction of equipment, provided due diligence has been met in maintaining
11 the recording equipment;

12 (4) Substantial exigent circumstances exist which prevent the recording;

13 (5) Statements made as a part of routine processing or "booking": when the
14 interrogation takes place in another jurisdiction.

15 The State has the burden to prove by a preponderance of the evidence that an
16 exception is applicable.

17 **(c) Consequences of Failure to Record.** If the court finds by a preponderance of the
18 evidence that a person was subjected to custodial or non-custodial interrogation in violation
19 of this rule, then any statements made by the person during or following that non-recorded
20 custodial interrogation, even if otherwise in compliance with this section, are presumed to
21 be inadmissible in any criminal proceeding against the person, except for purposes of
22 impeachment.

1 The presumption of inadmissibility may be overcome by clear and convincing
2 evidence that the statement was voluntarily given and is reliable, based on the totality of the
3 circumstances.

4 (d) Preservation. Recordings are to be preserved until the conviction is final and all
5 direct and habeas corpus appeals are exhausted, or until the prosecution is barred by law. In
6 all class A felonies, recordings are to be preserved for 99 years.
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

1 **SUGGESTED NEW CRIMINAL RULE CrRLJ 3.7**

2 **CrRLJ 3.7 RECORDING INTERROGATIONS**

3 **(a) In General.** Custodial and non-custodial interrogations of persons under
4 investigation for any crime are to be recorded by an audiovisual recording made by use of
5 an electronic or digital audiovisual device.

6 **(b) Exceptions.**

7 (1) A spontaneous statement not made in response to a question;

8 (2) The person requests prior to making the statement that an electronic recording
9 not be made, and the request is electronically recorded;

10 (3) Malfunction of equipment, provided due diligence has been met in maintaining
11 the recording equipment;

12 (4) Substantial exigent circumstances exist which prevent the recording;

13 (5) Statements made as a part of routine processing or "booking"; when the
14 interrogation takes place in another jurisdiction.

15 The State has the burden to prove by a preponderance of the evidence that an
16 exception is applicable.

17 **(c) Consequences of Failure to Record.** If the court finds by a preponderance of
18 the evidence that a person was subjected to custodial or non-custodial interrogation in
19 violation of this rule, then any statements made by the person during or following that non-
20 recorded custodial interrogation, even if otherwise in compliance with this section, are
21 presumed to be inadmissible in any criminal proceeding against the person, except for
22 purposes of impeachment.

1 The presumption of inadmissibility may be overcome by clear and convincing
2 evidence that the statement was voluntarily given and is reliable, based on the totality of the
3 circumstances.

4 (d) Preservation. Recordings are to be preserved until the conviction is final and all
5 direct and habeas corpus appeals are exhausted, or until the prosecution is barred by law.
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25