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PROSECUTING ATTORNEYS



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April 30, 1029

Honorable Susan L. Carlson
Supreme Court Clerk
Temple of Justice
P.O. Box 40929
Olympia, WA 98504-0929

Re: Proposed amendments to CrR 4.7 and CrRLJ
New Proposed Rules CrR 3.7, CrR 3.8, CrR 3.9, CrR 4.11, CrRLJ 3.7, CrRLJ
3.8, CrRLJ 3.9, and CrRLJ 4.11

Dear Clerk Carlson:

The Washington Association of Prosecuting Attorneys ("WAPA") represents the elected prosecuting attorneys of Washington State. Those persons are responsible by law for the prosecution of all felony cases in this state and of all gross misdemeanors and misdemeanors charged under state statutes. WAPA's members are also the legal advisor to county sheriffs. Washington's 39 elected prosecuting attorneys have also been directed by the legislature to "[s]eek to reform and improve the administration of criminal justice and stimulate efforts to remedy inadequacies or injustice in substantive or procedural law." RCW 36.27.020(11).

A prosecutor serves two important functions. A prosecutor must enforce the law by prosecuting those who have violated the peace and dignity of the state by breaking the law. A prosecutor also functions as the representative of the people in a quasijudicial capacity in a search for justice. "Defendants are among the people the prosecutor represents. The prosecutor owes a duty to defendants to see that their rights to a constitutionally fair trial are not violated." *State v. Monday*, 171 Wn.2d 667, 676 (2011). Victims of crimes are also among the people the prosecutor represents. The prosecutor owes a duty to victims to see that they are accorded dignity and respect and that their rights are not violated. *See, e.g.*, Const. art. I, § 35; Chapters 7.69, 7.69A, 7.69B, 10.99 RCW.

WAPA strives to ensure that every prosecuting attorney and deputy prosecuting attorney are aware of their constitutional obligations to defendants. Training programs routinely include sessions regarding *Brady* and other discovery obligations. WAPA, acting both independently and with the Washington Association of Sheriffs and Police Chiefs

(“WASPC”), develop model policies regarding potential impeachment disclosures, eye witness testimony, and other areas of law.¹

WAPA frequently participates with organizations that represent victims, criminal defendants, and privacy interests in the development of model guidelines that seek to protect everyone’s rights. WAPA regularly advises the legislature regarding potential legislation.

Whether to grant a criminal defendant or suspect protections beyond that demanded by the Washington and United States Constitutions are policy questions best left to the legislature. Every non-constitutionally mandate protection represents a tradeoff between wrongful convictions and wrongful acquittals. *See generally* Paul G. Cassell, Tradeoffs Between Wrongful Convictions and Wrongful Acquittals: Understanding and Avoiding the Risks, 48 Seton Hall L. Rev. 1435 (2018); Paul G. Cassell, Freeing the Guilty Without Protecting the Innocent: Some Skeptical Observations on Proposed New “Innocence” Procedures, 56 N.Y.L. Sch. L. Rev. 1063 (2012).

Under the Washington Constitution the legislature, rather than the courts, is responsible for setting public policy. *See, e.g., Rousso v. State*, 170 Wn.2d 70, 92, 239 P.3d 1084 (2010) (“[i]t is the role of the legislature, not the judiciary, to balance public policy interests and enact law”). The legislature, unlike the courts, is equipped to determine which risks are acceptable and which are not. *Id.* at 88. The legislature is also best equipped to determine priorities regarding the expenditure of funds for non-constitutionally mandated programs or procedures. *See, e.g., Hillis v. Department of Ecology*, 131 Wn.2d 373, 390 (1997). A court may only order funding for a court-related function that the legislative branch has not provided when the court’s very existence or ability to perform its core functions are at issue. *See In re Juvenile Director*, 87 Wn.2d 232 (1976).

The legislature possesses mechanisms for gathering public input such as hearings and committees that this court lacks. Recently, the legislature utilized all its tools in considering whether to adopt protections regarding eyewitness and informant testimony. SSB 5714, which is awaiting the governor’s signature,² was preceded by multiple public hearings conducted over a number of years at which representatives from the Washington Association of Prosecuting Attorneys, Innocence Project Northwest, Superior Court Judges Association, Washington Association of Sheriffs and Police Chiefs, Board for Judicial Administration, Washington Defender Association, Washington Association of Defense Counsel, and UW School of Law Legislation Advocacy Clinic. *See* Washington State Legislature Bill Information for SB 5714 (2019-20); SB 5038 (2017-18); SB 5067

¹WAPA’s Potential Impeachment Disclosure and Eyewitness ID Policy may be found at <http://70.89.120.146/wapa/materials/2013pidmodelpolicy.pdf> and <http://70.89.120.146/wapa/materials/2015%20Eyewitness%20ID%20Policy.pdf> (last visited Apr. 30, 2019).

WASPC’s model policies may be found at <https://www.waspc.org/model-policies> (last visited Apr. 30, 2019).

²The bill as passed by the legislature may be viewed at <http://lawfilesexternal.wa.gov/biennium/2019-20/Pdf/Bills/Senate%20Passed%20Legislature/5714-S.PL.pdf#page=1> (last visited Apr. 30, 2019).

(2015-16); SB 6503 (2015-16); HB 2654 (2015-16).³

The proposed amendments to CrR 4.7 and CrRLJ and proposed new rules CrR 3.7, CrR 3.8, CrR 3.9, CrR 4.11, CrRLJ 3.7, CrRLJ 3.8, CrRLJ 3.9, and CrRLJ 4.11, go far beyond constitutional requirements. The proposed rules conflict with newly enacted SSB 5714 and legislative intent by adopting language and requirements identical to or substantially similar to that contained in failed bills. The proposed rules would incur substantial costs for which there is no legislative appropriations. The proposed rules treat victims and witnesses disrespectfully by applying a presumption that their testimony should not be believed and removing privacy protections they are entitled to by statute and Const. art. I, sec. 7. The proposed rules and amendments place new restrictions and requirements upon executive branch police officers' investigations, rather than addressing court procedures. Finally, the proposed amendments and new rules will dramatically increase the number of wrongful acquittals at the expense of public safety.

WAPA agrees with those comments already provided to the Court from prosecuting attorneys and deputy prosecuting attorneys. WAPA supplements those comments with the following:

CrR 4.7 and CrRLJ 4.7 Proposed Amendments

Some of the proposed changes to section (a) of the rule exceed constitutional requirements. While prosecuting attorneys have a duty to provide potential impeachment evidence (PIE) to defense that is known to other members of the prosecuting team, the proposed rule's "including the police," goes far beyond the investigating agency and is impossible to comply with. The King County Prosecuting Attorney has no way to compel federal law enforcement agencies to provide PIE in their possession related to a witness in a state court prosecution. A deputy prosecuting attorney in Asotin County has no way to know that a City of Bellingham police officer may possess PIE regarding a witness when the information did not result in a criminal arrest and/or charges.

The proposed amendments to section (a) would dramatically alter the remedy for a constitutional violation of the *Brady* line of cases. A violation of the defendant's due process rights from the failure to turn over material exculpatory evidence is a new trial, not dismissal of charges. A violation of CrR 4.7, however, can result in the dismissal of charges. See CrR 4.7(h)(7) and CrRLJ 4.7(g)(7)(ii).

The proposed changes with respect to the custody of discovery removes any oversight that protects victims and witnesses's privacy. There is no constitutional right to defendants receiving copies of discovery, and the current language was a balance between respecting witnesses and victims' privacy while allowing defense counsel to spend their time on other tasks while a defendant reviewed discovery. The proposed language upsets that balance, allowing autopsy photos, laboratory results, medical records, interior photographs of homes, cell phone records, and numerous other items to be freely provided to defendants. The proposed language, moreover, provides no mechanism to ensure that the required redactions have been made before discovery is provided to defendants. The

³Bill information may be accessed from <https://app.leg.wa.gov/billinfo/> (last visited Apr. 30, 2019).

availability of judicial review after unredacted discovery has been provided to a defendant is insufficient to shield a victim or witness from identity theft, harassment, and potential physical harm.

Proposed New Rules CrR 3.7 and CrRLJ 3.7

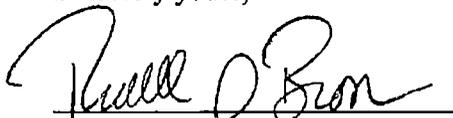
Neither due process, the Fifth Amendment, nor the Sixth Amendment require that all custodial and non-custodial interrogations be recorded by an audiovisual device. Nonetheless, these proposed rules presume that all custodial and non-custodial interrogations will be suppressed upon a preponderance of evidence demonstrating a violation of the proposed rules. This remedy would result in a significant increase of wrongful acquittals to the detriment of public safety.

The cost of complying with these proposed rules would be extreme. Every officer would be required to wear body cameras that must record every interaction between an officer and a citizen because any question might be considered "non-custodial interrogation" if the answer or other observations lead to discovery of a criminal offense. Every patrol car would need to be equipped with an audio visual device. Every interrogation room would require cameras and recorders. The cost of this hardware is staggering, but represents only a fraction of public funds required to comply with the proposed rules.

The hardware, much of which will be exposed to extreme weather conditions, must be maintained. All of the recordings must be indexed and stored. Requests from the public for copies of the recordings must be managed. Necessary redactions require specialized computer programs and/or technical assistance that many rural police agencies lack. Errors in dealing with Public Records Act requests are accompanied by substantial litigation costs and financial penalties.

At a time when numerous police agencies in Washington cannot provide nighttime patrols, the decision whether to shift limited funds from personnel to recordings should be made by the locally elected legislative authorities, not by this Court.

Sincerely yours,

A handwritten signature in cursive script, appearing to read "Russell Brown", written over a horizontal line.

Russell Brown
Executive Director

Tracy, Mary

From: OFFICE RECEPTIONIST, CLERK
Sent: Tuesday, April 30, 2019 3:08 PM
To: Tracy, Mary
Subject: FW: Comments regarding Proposed Amendments to CrR 4.7 and CrRLJ 4.7 and Proposed New Rules CrR 3.7, CrR 3.8, CrR 3.9, CrRLJ 3.7, CrRLJ 3.8 and CrRLJ 3.9
Attachments: Rules Comment Letter.pdf

From: Pam Loginsky [mailto:pamloginsky@waprosecutors.org]
Sent: Tuesday, April 30, 2019 3:07 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Cc: Russell Brown <rbrown@waprosecutors.org>; Salina James <salinajames@waprosecutors.org>; Amber Haslett-Kern <amberhaslett@waprosecutors.org>
Subject: Comments regarding Proposed Amendments to CrR 4.7 and CrRLJ 4.7 and Proposed New Rules CrR 3.7, CrR 3.8, CrR 3.9, CrRLJ 3.7, CrRLJ 3.8 and CrRLJ 3.9

Dear Clerk:

Attached is a letter containing WAPA's comments regarding the above identified proposed amendments and proposed new rules. Please contact me if you should experience any difficulty in opening the attachment.

Sincerely,

Pam Loginsky
Staff Attorney
Washington Association of Prosecuting Attorneys
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Olympia, WA 98501

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