Tracy, Mary

From: OFFICE RECEPTIONIST, CLERK
Sent: Monday, April 22, 2019 8:03 AM
To: Tracy, Mary
Subject: FW: Comment re proposed changes to CrRLJ 3.7

From: Guthrie, Stephanie [mailto:Stephanie.Guthrie@kingcounty.gov]
Sent: Sunday, April 21, 2019 11:22 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Subject: RE: Comment re proposed changes to CrRLJ 3.7

I am writing to express my concern with many of the propose changes to the criminal rules. I neglected to include CrRLJ 3.7 in my comments about CrR 3.7. However, the same concerns apply that I set out regarding CrR 3.7:

I find proposed CrR 3.7 extremely concerning because 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 and therefore having an officer say what a defendant said (3.7) or say that a witness identified someone (3.8) are so inherently unreliable that they should be inadmissible, unless there is video proof. In essence CrR 3.7 and 3.8 say that police, because they are police, cannot satisfy hearsay exceptions (party opponent, statement of identification). This undermines the fundamental nature of our fact finding system: allowing the jury to determine credibility.

More specific concerns are as follows:

CrR 3.7 RECORDING INTERROGATIONS

(a) Custodial and non-custodial interrogations of persons under investigation for any crime are to be audiovisually recorded, by electronic or digital device.

- **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.** 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.** It imposes an unreasonable burden on law enforcement.

- **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.
- **The rule is impractical – most police agencies in Washington lack the resources to record and preserve the broad range of interactions that would fall within the rule.** The additional burden of preserving detailed maintenance records of every recording device used also is unwarranted.
- Proposed CrR 3.7 would require sweeping changes to police procedure in the investigation of every incident that may constitute a crime. Not only would it obstruct these investigations, it is an unrealistic mandate and unless it is funded by the court, impossible due to lack of equipment that would be required.
- The rule presumes that any statement not taken in compliance with the rule is untrustworthy. It codifies a presumption that officers who have taken an oath to uphold the law are presumed to be unreliable witnesses. It shifts the normal burden away from the person trying to suppress the evidence onto the State, with no reason.
- Proposed CrR 3.7 is not limited to interrogations by law enforcement. Does it apply to retail security? Child/ Adult Protective Service employees? Any state employee or agent? Private citizens? Judges?
- The rule does not define "interrogation." Subsection (b) suggests any question is an interrogation. It could be broadly interpreted to include actions likely to provoke a response.
- Proposed CrR 3.7 imposes an impossible burden. It would require universal recording of everyone with whom an investigator speaks/ interacts to avoid errors, violating the privacy rights of citizens and producing a massive amount of recordings that will be subject to public disclosure.
- This is an unwarranted burden on police investigations.
- The rule does not limit applicability to events that occur after enactment of the rule. Even if it did, most law enforcement agencies will be unable to immediately acquire video recording equipment for all officers to carry at all times (the financial and practical obstacles would be overwhelming), and to retroactively create maintenance records as to existing equipment.
- The rule will require litigation as to whether the questioner knew the person questioned was "under investigation," when the questioner knew that, and perhaps whether the questioner should have known the person could be implicated in a crime (<u>any</u> crime). Is it a subjective or an objective standard? What if the person becomes a suspect mid-questioning?
- Proposed CrR 3.7 is an improper exercise of the court's authority, forcing specified investigative procedures without legal authority to direct police use of resources and the nature of their interrogations.

(b) <u>Exceptions</u>. State has the burden of proof that an exception applies by a preponderance.

(1) Spontaneous statement not in response to question.
(2) Prior to the statement, the person <u>refuses</u> recording, and <u>*that* is electronically recorded</u>.

- The requirement that a refusal be recorded violates the subject's rights under the Washington Privacy Act right not to be recorded.
- A person who refuses to be recorded will not permit recording that either.

(3) Equipment malfunction, if due diligence is met in maintaining the equipment.

- **The requirement of "due diligence" in maintaining equipment will result in extensive litigation over maintenance standards and procedures, what is due diligence in maintenance, maintenance records, and what is the necessary proof of maintenance.**
- It is a substantial and unreasonable burden on police agencies (and other investigating agencies) to establish a maintenance protocol and maintain records of maintenance of all recording equipment.

(4) Substantial exigent circumstances prevent recording.

- **The meaning of "substantial exigent circumstances" is unclear. Would it include the scene of a traffic collision? Would it apply if the suspect is in the hospital? Would it apply if the suspect is at a facility (e.g. SCORE) with no video available?**
  - **Does "substantial exigent circumstances" extend to an officer's determination that recording will impede a homicide investigation?**
  - Does "substantial exigent circumstances" include covert operations or knock-and-talk investigative procedures?

(5) Routine processing/ "booking," interrogation in another jurisdiction.

- **This subsection does not make sense.**
- The only way that the reference to "interrogation in another jurisdiction" makes sense is if it is intended to be listed as a separate exception.

(c) Consequences. If a court finds a violation of the rule by a preponderance, any statement during or following that interrogation, even if it otherwise complies with this rule, is presumed inadmissible in any criminal proceeding against the person, except for impeachment. The presumption may be overcome by clear and convincing evidence that the statement was voluntarily given and is reliable, based on the totality of the circumstances.

- **The remedy for violation of CrR 3.7, exclusion of the statement and all subsequent statements, is extreme and unnecessary.**
- **This rule will keep relevant and sometimes critical evidence from the jury when there is no question that a statement was voluntarily given.**
- **In order to admit a statement that is not recorded the rule imposes a burden on the State to prove the defendant's statement is reliable, when the probative value may be in the lies that the defendant is telling.**
- It is unclear whether, to overcome the presumption, the initial statement must be proven voluntary and reliable or every subsequent statement must be.
- The standard for overcoming the presumption of inadmissibility grants to the judge the decision that should be left to the jury – the probative value to be given to these statements.

- It is an arbitrary and punitive choice to apply a standard of proof to overcome the presumption of inadmissibility that is a higher standard than applies to alleged constitutional violations.

(d) Preservation. Recordings must be preserved until conviction is final and all direct and habeas appeals are exhausted, or until prosecution is barred by law. "In all Class A felonies" must be preserved for 99 years.

- The rule requires preservation of all interrogation recordings until the subject dies (there is no limit to habeas review).
- As to all crimes that could be prosecuted as a Class A felony (including all deaths and most sex crimes), all interrogations must be preserved for 99 years, even if it is concluded that a death was suicide, or a defendant confesses, is prosecuted and dies. This mass of recordings would be available to the public.

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