Tracy, Mary

From: OFFICE RECEPTIONIST, CLERK
Sent: Wednesday, April 17, 2019 11:19 AM
To: Tracy, Mary
Subject: FW: Order 257-A-1236 Amendment to the CrRLJ Rules

From: Tye Graham [mailto:tgraham@ci.olympia.wa.us]
Sent: Wednesday, April 17, 2019 11:13 AM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Subject: Re: Order 257-A-1236 Amendment to the CrRLJ Rules

Washington State Supreme Court

RE: Order 25700-A-1236 Amendment of the CrRLJ Rules

Your honors:

I am a prosecutor for the City of Olympia and actively practice in the area of criminal law in Olympia Municipal Court. I am opposed to each of the offered rules and amendments for the reasons below and I will concentrate my comments to the suggested amendments to the CrRLJ rules which I have the most familiarity with, but believe my comments would equally apply to the CrR rules.

Suggested rule CrRLJ 3.7:

This rule does not define what an interrogation is, but likely means questioning by law enforcement. The rule requires recording even when the person does not want to be recorded, to say they do not want to be recorded, contrary to RCW 9.73.030. This also appears to be in contention with ER 801(d)(2), statement of a party opponent. This rule would be better titled as 'we do not believe law enforcement' as it is framed such that law enforcement is not a credible witness. If a lay person asks a defendant a question and gets an answer that would admissible as it would likely not be characterized as an interrogation. With the only difference is if the questioner has a badge, this rule sends the message to all law enforcement that they are not credible and that is unacceptable. The entire purpose of this rule is to place an onerous burden upon law enforcement with the only actual intent is to suppress as much evidence as possible. This rule would effectively require all law enforcement officers to have body cams because in an active crime investigation, many people are questioned outside of a room in the police department and would likely be viewed as an 'interrogation'. Body cams are an expense not every city can afford.

As the court knows, all recordings are public records. Those audiovisual recordings would be subject to the public records act. This rule would bankrupt many of the smaller police departments and cities/towns because of the administrative costs involved in even the simplest of public records requests that require legal review prior to release. At a recent conference, I heard that the City of Seattle currently has video PRA requests that will take over 100 years to complete. The small cities would never be able to comply.

Suggested rule CrRLJ 3.8:

This appears to be a rule that mandates what is currently a question of weight over admissibility to the evidence of identification. Rather than have prosecution and defense question the witness and law enforcement officer(s) as to the identification procedure, this rule is now mandating the recording of that process or fully documenting it. This could be a best practice idea, but should not cause suppression for failure to meet this standard. There is no similar rule of evidence in the criminal practice of law. The closest would be in DUI prosecution, but even with DUIs the documentation is not required, but certainly does help in speeding the case resolution. In the end the question of identity of the perpetrator should be of higher concern than the proper documentation of that

procedure. There is already plenty of case law as to appropriateness of line-up and montage identity procedure that does not need this added requirement.

Suggested rule CrRLJ 3.9:

This is another rule that appears be attempting to circumvent the question of weight and admissibility because defense does not want to have to make the argument. Being able to ask a witness if the defendant is the person they saw goes directly to the evidence that the prosecution must prove in every case. This should never be taken away simply because they were not subject to an out-of-court identification procedure.

Suggested amendment to CrRLJ 4.7:

(3): "tends to impeach..." I am uncertain what this could possibly mean. This is an overreach from *Brady* and should not be allowed. Either it does impeach or it does not. This gray area does not benefit the law and there is no guidance on what this could be defined as.

(4): The prosecution cannot produce information it has no knowledge of nor any control over. Soon we'll be litigating that an ATM camera might have caught a reckless driving incident and the prosecutor has to get that video even when he/she didn't even know there was an ATM camera there. Defense will no longer be seeking evidence that disproves their client's guilt but that there might have been evidence held by someone that the prosecutor didn't get and send in discovery even if the prosecutor had no reasonable way to know it existed.

(g)(3): There are many times when information should not be disclosed to the defendant but is necessary to disclose to their attorney. Those situations are entirely based upon safety of the victim from retaliation. Which information is redacted is often situational and should not just be solely a laundry list. For instance a victim/witness that lives in a rural city like Usk, WA or Dallesport. They are not protected because you removed the street address when there are only a hundred people living in that city/town.

Suggested rule CrRLJ 4.11:

This rule is in direct conflict with RCW 9.73.030. A person's exercise of consent, or refusal of consent, as to a right should not be open for attack any more than a prosecutor can comment on a defendant not taking the stand. There is already a method for impeachment of a witness's prior statement, have a witness present during the questioning.

Thank you for your time,

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