**Tracy, Mary**

**From:** OFFICE RECEPTIONIST, CLERK
**Sent:** Tuesday, April 30, 2019 1:40 PM
**To:** Tracy, Mary
**Subject:** FW: Objections to proposed rule changes to CrRLJ 3.7, 3.8, 3.9, 4.7, and 4.11.

**From:** Malcolm, Danielle N [mailto:Danielle.Malcolm@seattle.gov]
**Sent:** Tuesday, April 30, 2019 1:40 PM
**To:** OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
**Subject:** Objections to proposed rule changes to CrRLJ 3.7, 3.8, 3.9, 4.7, and 4.11.

I am writing in opposition to the proposed amendments to CrRLJ 3.7, 3.8, 3.9, 4.7, and 4.11.

CrRLJ 3.7

The proposed amendments to CrRLJ shift the reliability of nonrecorded statements from a matter of weight to a matter of admissibility without sufficient basis for doing so. Currently, defense attorneys are free to argue to the finder-of-fact that a prior statement should be given less weight because it was not recorded. Notably and inconsistently, this rule could suppress an unrecorded confession of a Defendant but not the unrecorded favorable statement of his alibi witness so long as that witness was not a person "under investigation for any crime" at the time. This proposed amendment would also come at significant cost from equipment and storage related costs and from litigation about whether an exception has been met.

CrRLJ 3.8

Similar to the above, this proposed amendment shifts the reliability of identifications from a matter of weight to a matter of admissibility without sufficient basis for doing so. It even goes so far as to allow suppression of an out-of-court identification if the officer forgot to include the location where the identification occurred or list all of the bystanders. See proposed CrRLJ 3.8(c)(1 and 6).

CrRLJ 3.9

This proposed amendment presumes that in court identification are so categorically unreliable as to warrant inadmissibility unless the witness knows the Defendant or previously completed an out-of-court eyewitness identification procedure. It would require eyewitness identification procedures to be conducted even when identify is not an issue. Officers would have to conduct identification procedures on themselves in nearly every case in order to be permitted to identify the Defendant in court, even when there is admissible in-car video or body-worn video of the Defendant interacting with the officer. It would also exclude in-court identifications, unless the Defendant was previously known or an identification procedure was previously conducted, when the

defendant was caught in the act and then taken into custody and held in custody until appearing in trial. This rule sweeps too far, especially because defense attorneys may already cross-examine witnesses about in-court identifications and argue to the finder-of-fact that the identifications are unreliable.

CrRLJ 4.7

In regards the proposed amendments to CrR 4.7(a)(3 and 4), information "that tends to negate the Defendant's guilt as to the offense charged" already includes information that "tends to impeach a State's witness." See, e.g., *State v. Bebb*, 44 Wn. App. 803, 817, 723 P.2d 512, 520 (1986), aff'd, 108 Wash. 2d 515, 740 P.2d 829 (1987) (noting that the discovery rule is a codification of constitutional requirements). If the purpose of this phrasing is to match the prosecution's *Brady* requirements, then it is unnecessary. If the purpose of this phrasing is to expand the prosecution's obligations beyond *Brady*, then it is unwarranted.

Concerning CrR 4.7(h)(3), the proposed amendments contain no exception for medical information, e.g. HIV status may included in an alleged victim's medical records in an assault case. It also does not include an exception for email addresses, social media accounts, or other means beside telephone and address that could be used by a Defendant to directly contact a prosecution witness. Unlike CrR 4.7(e)(2) which permits the court to condition or deny disclosure to defense, the proposed amendment does not contain a balancing test that could be used to prevent disclosure of information to a Defendant if there is a risk of harm. Nor does the amendment require redaction of tactical law enforcement information or the identities of undercover officers or exclude the same information as the Privacy Act. See RCW 42.56.240. It would allow Defendants charged with rape and murder to have personal copies of photographs of their victims without redactions or notice to the court, prosecution, or the victim or their family. The rule also does not provide a standard for what constitutes a "proper showing" to permit the court to review a defense attorney's redactions.

CrRLJ 4.11

CrRLJ 4.11(a and d) are directly inconsistent with *State v. Mankin,* 158 Wn. App. 111, 124, 241 P.3d 421 (2010), review denied, 171 Wn.2d 1003, (2011) in which the Court stated, a "witness may...choose under what conditions he or she is willing to give an interview, including whether it should be recorded." It is also indirectly inconsistent with the line of cases refusing to penalize the prosecution for witnesses who do not cooperate with defense interviews. See *State v. Clark*, 53 Wn. App. 120, 124, 765 P.2d 916 (1988), review denied, 112 Wn.2d 1018 (1989); *State v. Cunningham*, 51 Wn.2d 502, 505, 319 P.2d 847 (1958); *State v. Vance*, 184 Wn. App. 902, 912, 339 P.3d 245 (2014), review denied, 182 Wn.2d 1020 (2015); *State v. Wilson*, 108 Wn. App. 774, 780, 31 P.3d 43, 47 (2001), aff'd, 149 Wn. 2d 1, 65 P.3d 657 (2003). Adoption of this rule would allow a jury instruction indicating that the jury may hold a witness's decision to not be recorded against their credibility; however, defense attorneys may already cross-examine a witness's refusal to be interviewed and argue accordingly to the finder-of-fact without this amendment. Presumably, this amendment would not allow the prosecution to obtain a such a jury instruction if the Defendant had been previously interviewed by police but refused to be recorded during the interview. As such, a situation could arise where both the victim and the Defendant had previously completed interviews and refused to be recorded, both testified and were impeached with reference to their unrecorded interviews, but then the jury would only be instructed to hold the witness's refusal to be interviewed against their credibility. As this amendment is contrary to ample case law and could result in unjustified inconsistency, it should be rejected.

Regards,

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