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April 30, 2019

Washington Supreme Court
PO Box 40929
Olympia, WA 98504-0929
Via email: supreme@courts.wa.gov

RE: Public Comments requesting the Supreme Court to Adopt CrR/CrRLJ 3.7, 3.8, 3.9, 4.7, and 4.11.

To the Washington State Supreme Court:

I write to urge the Washington State Supreme Court to adopt the following proposed rules:

CrR/CrRLJ 3.7 — Recorded Interrogations

The Washington Association of Criminal Defense Lawyers is proposing this rule to improve the reliability and integrity of evidence. Having a full record of an interrogation will allow an attorney, the prosecutor, the court and the jury to hear all questions that were asked and all answers that were given. Juries are not left to hear about the interrogation by law enforcement, but rather can hear the entire interrogation. This also allows the defense and experts and the prosecutors to assess the interrogation itself. Recording the entire interrogation also protects law enforcement from false allegations of coercion or other misconduct. Having a full record of interrogations protects the fairness and integrity of our criminal justice system and will help reduce the number of wrongful convictions. In the 21st Century, we now have the technology to inexpensively protect the integrity of the investigative process, particularly the interrogation of a suspect. We should make use of this technology.

This recording is important because The Innocence Project reports that, since 1989 and based on DNA evidence, 354 people have been exonerated of crimes they did not commit. Of those 354 cases, 70 % involved eyewitness misidentification. 28 % involved false confessions. 51 % of the false confessors were 21 years old or younger at the time of arrest. 35 % of the false confessors were 18 years old or younger at the time of arrest. 10 % of the false confessors had mental health or mental capacity issues. See https :// www.innocenceproject. org/dna-exonerations- in-the-united-states/ .

CrR/CrRLJ 3.8 — Record Eyewitness Identification Procedure

Making an accurate record is the only way that we can improve the integrity of the investigation process. Current research is showing that there are issues with eyewitness identifications that were not as accurate as once thought. Creating transparent and uniform procedures for eyewitness identification procedure will help improve the reliability of eyewitness identification evidence by permitting the jury and expert witnesses to assess the actual identification procedure itself. They will not be limited by a third person's account of the identification procedure. As the Innocence Project has shown, eyewitness identification is the leading cause of wrongful convictions. Approximately 75% of all DNA exonerations include mistaken eyewitness identification as contributing to the wrongful conviction. More complete, objective and accurate account of the identification procedure will help to improve the reliability of evidence.

CrR/CrRLJ 3.9 — Exclude First Time In-Court Eyewitness Identifications

As the Innocence Project as shown, mistaken eyewitness identification is the leading cause of wrongful convictions. In-court identifications are particularly suggestive. Generally, there is a single defendant sitting at defense counsel table. The guy without a tie. This focuses the in court identification solely on the defendant and implies there is a substantial expenditure of resources on getting the defendant to this point. This creates pressure of the in court identification witness to pick the "guy at the defense table who isn't wearing a tie". It is unfair and unduly suggestive to have a witness identify for the first time the single defendant as the perpetrator of a crime long after the crime itself occurred. The identification procedure should be conducted pretrial following best practices. Simply put, there is no good reason to allow a witness who has not previously identified the accused to do so for the first time in court.

CrR/CrRLJ 4.7 — Discovery (Brady Fix and Redacted Discovery)

The current version of CrR/CrRLJ 4.7(a)(3) and (4) provide for exculpatory evidence in the possession of the prosecutor. The rule does not extend to information held by law enforcement and does not extend to impeachment material. These rules do not comply with the prosecutor's obligations under Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963) and its progeny, which requires the prosecutor to provide to the defense all exculpatory information and impeachment material whether in the possession of the prosecutor or in the possession of law enforcement. The court rule should accurately reflect federal constitutional requirements.

CrR/CrRLJ 4.7(h)(3) - Permit the defense to redact discovery and then provide it to a defendant without approval of the court or of the prosecutor.

It is difficult to understand that, if you are accused of a crime, you cannot have a copy of a police report that contains the allegations against you. Currently, the defense attorney must redact the discovery and send it to the prosecutor where it can sit on a prosecutor's desk for days, weeks and sometimes months waiting to be reviewed for approval. This proposed rule would recognize that defense attorneys are officers of the court and can make appropriate redactions without prosecutorial oversight. I have had several cases where the prosecutor never reviewed redacted discovery or reviewed it only after a motion to compel. This rule would ease the burden of prosecutors and is more efficient and effective for getting copies of discovery to defendants.

CrR/CrRLJ 4.11 — Recorded Witness Interviews

Defendants have a constitutional right to pretrial witness interviews. However, there is no requirement to allow an attorney to audio record or have a court reporter present at pretrial interviews, without the witness' permission. There is no obvious reason why anyone would object to recording an interview and it is common sense that an accurate record of the interview is in everyone's interest. Without a recorded interview the witness cannot be held to the answers they provided. A witness may change a statement or answer to a question between the interview and the trial and there is no way for the attorney to impeach that witness. Over time, memories fade and it benefits the witness to have a transcript of the interview to review before they testify at trial. The truth-finding function of the courts and fundamental fairness require that attorneys be permitted to have an accurate account of pretrial interviews, even over the witness' objection. There may be some legitimate reason for objecting to recording and this rule also contains a provision where the witness may withhold consent to being recorded and the judge can determine to the reason for such refusal and may fashion an appropriate remedy based on the witness' reasons for refusing to be recorded or have a court reporter. This will help ensure the accuracy of evidence and the fairness of trials.

The current legal framework for these issues is clearly not working. The rules suggested are easy to implement, will improve the reliability of evidence and will make trials fairer to all involved, including law enforcement, witnesses, victims and defendants.

There are many comments opposed to the proposed rules. Although not an exhaustive list, I will address some of the raised by those opposed to the proposed rules.

First, one comment opposing the rules stated that "...these proposals seem to create more problems than solutions. The problems arise from imposing bright-line bars and/or requirements in circumstances that require thoughtful analysis and balanced decision making, not to mention case-specific fact finding."

CrR/CrRLJ 3.7 has presumption of recording, not a bright-line rule. There are five listed exceptions. In addition to the exceptions, the State may still overcome the presumption by showing by clear and convincing evidence that the unrecorded statement is nevertheless reliable.

CrR/CrRLJ 3.8 has a presumption of recording, also not a bright-line rule. Video recording is preferred, audio recording is the preferred alternative if video recording is not available, If neither are available, a detailed report should be written. The rule does not contain a "shall" rather the rule states " . . .should be fully documented": All identification procedures and related interviews conducted with any victim/witness should be fully documented. Video-recording should be used when practicable.
And similarly, the remedy section for violation of the rule contains many exceptions: If the record that is prepared is lacking in important details as to what occurred at the out-of-court identification procedure, and if it was feasible to obtain and preserve those details, the court may, in its sound discretion and consistent with appropriate case law, declare the identification inadmissible, redact portions of the identification testimony, admit expert testimony, and/or fashion an appropriate jury instruction to be used in evaluating the reliability of the identification.

CrR/CrRLJ 4.11 also is not a bright-line rule. It provides that a witness may refuse to be recorded. The parties can then engage in a thoughtful and carefully considered analysis as for the reasons for the refusal to be recorded, and then, depending on the reasons for the refusal, the court could give a jury instruction addressing the specific facts of that case, if warranted. Rather than being a bright-line rule, these rules give guidance and direction to all parties and to the trial court such that all parties and the court could engage in a thoughtful analysis and balanced decision based on case specific fact finding, while at the same time improving the reliability and objectivity of the evidence.

Second, many comments suggested there would be an added cost. It is unlikely that there will be any additional cost. These rules will actually save money in report costs. Rather than have to write a report based on notes, an officer who takes a witness statement, conducts an interrogation, or administers an eyewitness identification procedure can simply write in their report regarding the statement or procedure "See Recorded Statement." The cost of storage is less expensive than storing paper. Having the procedure or statement digitally recorded saves the cost of scanning. Additionally, this objection assumes a fear of technology and change. It is absurd not to take advantage of the advances in technology that allow us to cheaply and accurately record and store information.

Thirdly, one comment suggested that there was insufficient constitutional or case law support for the rules. It should be noted that the Washington Association of Criminal Defense Lawyers WACDL) submitted over 200 pages of supplemental material

supporting its suggested rules. The supporting documents included constitutional support, case law support, statistical support and many other supporting documents and information. The Supreme Court did not publish the extensive supporting documentation that WACDL submitted. I would request that the Court publish the supporting materials and extend the deadline for public comments as there is clearly interest in the supporting material, and there is clearly a negative inference from the lack of publishing the supporting materials. More information and input can only help the decision-making process.

Sincerely,

/S/ *Harry S. Steinmetz*
Harry S. Steinmetz
Attorney at Law

Tracy, Mary

From: OFFICE RECEPTIONIST, CLERK
Sent: Tuesday, April 30, 2019 10:00 AM
To: Tracy, Mary
Subject: FW: Comments on proposed rules
Attachments: Comments to the SC re proposed rules.pages.pdf

From: Harry Steinmetz [mailto:harry@steinmetzlaw.net]
Sent: Tuesday, April 30, 2019 9:59 AM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Subject: Comments on proposed rules

Dear Sir or Madam.
Attached please find my comments on the proposed changes to the Criminal Rules. I appreciate the opportunity to comment on them.

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