112 West 11th Street, Suite 200
Vancouver, WA. 98660

Phone: (360) 684-8290
Fax: (360) 694-7921

Steve@swthayer.com
www.swthayer.com

STEVEN W. THAYER, P.S.

ATTORNEYS AT LAW

Steven W. Thayer
Attorney at Law

Tavi-Marie Huffman
Legal Assistant

K. Jacy Thayer
Attorney at Law

Elizabeth Knable
Legal Assistant

Washington Supreme Court
P.O. Box 40929
Olympia, WA 98504-0929

In re: Proposed Discovery Criminal Rule Changes

To Whom It May Concern

The purpose of this letter is express support for proposed CrR3.7, 3.8, 3.9, 4.7 and 4.11, as outlined in the enclosed/attached correspondence from, T. Phelan, Attorney at Law. Mr. Phelan's views on the purposed rule changes are based on 40 years of legal experience with an emphasis in criminal defense. Because our criminal discovery rules are designed to promote fairness in the process, the accuracy of the information developed during criminal investigations is a priority. With advancing technology has come the opportunity to easily record by audio and often video interviews and procedures (such as line ups and show ups) that did not exist back when our criminal rules were first adopted. It is not only unfair to the defendant, but also unfair to the jury that not to have an accurate record. In civil cases the parties have always had a right to take depositions so as to ensure fairness in deciding cases. So, it is ironic that in criminal cases, where years of freedom are often at stake, the parties are not entitled to an accurate record. Back when a court reporter was the only way to make an accurate record that may have made sense, but not today when everybody has a device on their person capable of recording, video recording, and thereby preserving and accurate record of what occurred.

The proposed rule changes will help ensure fairness to the defendant, fairness to the victim, and most importantly fairness to the jury. These changes are long overdue, and should be adopted.

Sincerely,

Steven W. Thayer, WSBA #7449

March 7, 2019

Washington Supreme Court
PO Box 40929
Olympia, WA 98504-0929

Via US mail and email: supreme@courts.wa.gov

RE: Proposed Discovery Criminal Rule Changes

To Whom It May Concern:

What follows are my comments concerning the proposed amendments to the Superior Court Criminal Rules and District Court Rules regarding discovery and pretrial proceedings. These comments will be directed towards Superior Court Rules only and any comments concerning Superior Court Rules should also be interpreted as comments relating to the corresponding District Court Rules.

Proposed Rule CrR 3.7 – Recording Interrogations.

I have reviewed some of the comments by prosecuting attorneys regarding the proposed Rule, stating that advice of *Miranda* is sufficient, and that the police are already overburdened and overworked, and everyone should just trust that police will do their job. In the present system, it is a police officer's choice as to what words a jury and/or a factfinder will hear concerning interrogations made of suspects accused of a crime. Rather than hear the actual words spoken in a recording, police officers often times paraphrase and/or pick and choose from notes they take what words and thoughts to attribute to a person being interrogated.

In this respect, it is a common practice among police officers in my jurisdiction to take what I believe to be incomplete and often incorrect notes on a notepad during an interview with a person being interrogated. They are often scribbles or cryptic notes. The officers will then sometimes hours, or days later, prepare a police report in which they use these notes as a reference for what they believe was said by this particular individual. Often times they will use these notes as reminders of their own individual recollection of what was said. While I am sure many of these law enforcement officers

try hard to take accurate notes and prepare accurate reports, often times words or statements are left out of these reports, and there is no way to crosscheck the veracity of the statements by the officer. However, human error is unavoidable.

In this jurisdiction, once the report is prepared, police officers routinely, almost without exception, destroy their handwritten notes and we have no way of ascertaining exactly what they used to prepare their reports. I can't tell you the number of times in interviewing police officers where they will prepare a report, and then on their own "independent recollection", recall statements that were attributed to clients of mine that were not contained in any reports, or notes that have long since been destroyed. A recording of the interrogation would eliminate this issue.

I am very curious as to what the objection would be to having actual words of an accused person recorded and memorialized for use in trials and for that person to use to prepare for his/her particular defense. In today's age of digitalization and electronic media storage, this requirement places minimal burden on law enforcement, while improving the criminal justice system to ensure that statements made by people accused of crimes are accurately and fairly recorded to show the context and actual words spoken.

Proposed Rule CrR 3.8 – Recording Eyewitness Identification Procedure.

The remarks set forth above concerning proposed CrR 3.7 apply in this instance as well. Again, I can't understand why prosecutors object to having accurate and documented records made of identification procedures. Recent advancements in social science and law have shown the unreliability of out of court identification procedures. One would think that any effort to mitigate the concern regarding the unreliability of out of court identifications would be not only warranted, but desirable.

As an example of improper out of court identification procedures, one of my clients was subjected to a police show-up. At that time, the witness identified my client as the perpetrator of a theft. In my interview with the witness, which was recorded by the way, the individual stated that he was 110% certain that my client was the person he had seen commit the crime. Police did not contact one of the witnesses in the matter. Upon contacting that witness, I found that the witness had actually taken a photograph of the perpetrator of the crime. Upon reviewing the photograph, it was clear that my client was not the perpetrator. This shows not only the unreliability of eyewitness identification but the errors that can be made when using unreliably suggestive out of court and in court identification procedures.

As with recording interrogations, again, the present procedures in place regarding identification procedures are prone to human error from start to finish as it involves an individual's recollection and interpretation of what is said, what is done, and how the

procedures are implemented. Having these procedures documented and authenticated by way of audio or video recording would maintain and prove good work when it occurs, and expose poor work when it occurs. Again, the criminal justice system is enhanced when these type of procedures are implemented.

Proposed Rule CrR 3.9 – In Court Eyewitness Identification.

As with the previous proposed Rule changes, this proposed Rule would enhance the reliability of in court identifications by excluding those that are not based on reliable and properly documented out of court identifications. The fact that someone is sitting next to counsel, particularly an individual of color, enhances the prospect of misidentification when there has been no prior reliable out of court identification conducted. It is about as suggestive as it can be.

I recall when I was a young lawyer on a case where I was representing an African American male in a robbery. Prior to him being allowed to identify my client in court during trial, I showed him a photo laydown of six (6) pictures. My client's picture was in the photo laydown. He was unable to identify any of the individuals in the photo laydown as the perpetrator. I then moved to have the court exclude any in court identification as the individual was unable to identify my client from the photo laydown. The court nonetheless allowed the individual to proceed forward with an in court identification despite the fact that this individual was unable to pick my client as a perpetrator from a photo laydown minutes before. When the witness got into court, he then identified my client as the perpetrator. My client was the only African American male in the courtroom sitting next to a white attorney. This in court identification was obviously unreliable, yet the court allowed this witness to identify my client as a perpetrator.

It is perplexing why prosecutors would object to a more reliable in court identification procedure predicated on a reliable out of court identification.

Proposed Rule CrR 4.7 – Suggested Amendment to Criminal Rule 4.7 Discovery.

These Rules are common sense changes and much needed in the criminal case procedural arena. Why prosecutors would oppose turning over all notes relating to identification procedures whether they resulted in identification or not, or materials which would tend to impeach a State's witness, is mystifying. These changes are simply following the directives of *Brady v. Maryland,* which specifically outlines particular obligations with which the State needs to comply.

Allowing the defense attorney to provide a copy of reports directly to the defendant without presenting the same to the prosecuting attorney or the court only makes sense. The present Rule is unduly burdensome and often times delays the producing of

records to the defendant for review. Allowing an accused to review the materials outside of the attorney's office and custody, when properly redacted, assures that the accused truly does know what evidence there is against him/her and he/she does not have to rely upon his/her memory of reports after he/she has read them in their lawyer's office.

More importantly, as officers of the court, defense attorneys would be required to comply with the redaction provisions. It is insulting that the prosecuting attorneys think somehow that they have the magic ethical formula that allows them, and only them to properly redact materials, and that defense attorneys are going to somehow, contrary to a discovery Rule, release improper materials to the defendant.

The present process is sluggish and at times, whether intentionally or inadvertently, is used by the prosecution as a means to delay the defense in preparing its case. Simple reports sometimes a few pages long need to have redactions made, and are sent to a prosecutor who reviews them whenever he/she feels like it, and then he/she may or may not approve. Assuming the prosecutor approves, the materials can then be supplied to the defendant.

The other option is to approach the court to allow provision of copies to the accused. Again, this requires often times going to court for this one specific purpose or if in court on another matter, having this matter addressed. Our local courts will almost always indicate that a copy can be provided if the prosecutor has reviewed the proposed redactions. Again, the existing Rule is premised on the assumption that we as defense lawyers are simply going to be unethical and provide inappropriate information to our clients.

I have been practicing for nearly four (4) decades, and I can state that I have never provided a set of reports to a client without approval, redacted or unredacted, because the Rules preclude this. To assume that I, or other defense attorneys, are going to provide unredacted materials to the client is again assuming that as officers of the court, we will flagrantly break discovery rules.

Proposed Rule CrR 4.11 – Recording Witness Interviews.

Many of the comments by prosecutors are that the proposed Rule change requiring the recording of witness interviews is a setback for "victims," and that it violates the Privacy Act.

This opposition to me seems to be for no other reason than to hamper an accused's investigation into a case. Witnesses, sometimes law enforcement officers, will refuse to be tape recorded. This type of obstructionist behavior, whatever it is based upon, does little to aid in the administration of justice in a fair and impartial manner. Rather, it

precludes an accurate recordation and a memorialization of a person's statements for possible use at a later time and so that an accused can prepare for trial.

This proposed Rule applies to both parties and is also not limited to a defense lawyer procuring a taped statement. This proposed Rule likewise protects the rights of parties under the Discovery Rules to seek protective orders. Furthermore, this Rule change does nothing more than clarify what routinely occurs in many, many cases and that is that witnesses agree to be tape recorded and if they fail to agree to be tape recorded, that point should be allowed to be brought up in front of the factfinder as to a person's bias and/or lack of ability to recall things accurately.

Again, one has to wonder why the prosecution strongly objects to this. I have seen officers refuse to be tape recorded despite the fact that they are in essence professional witnesses who are often times the main and only witness against our client. These officers do this as an obstruction tactic. Rather than help assemble evidence and let a jury determine guilt, these tactics do little to further the truth and administer justice in a fair and accurate manner.

The claim that individuals' rights to privacy will be violated by requiring that witnesses submit to tape recorded interviews is a red herring and again should not be allowed to override the right of an accused to have full and fair discovery and confrontation of witnesses in a full and effective manner. In the age of electronic digital storage and social media, it is mystifying why prosecutors continue to insist on an outdated method of securing and memorializing witness statements. Lastly, any claim to privacy is rendered meritless by the fact that individuals are witnesses to crimes. As such, they will be testifying in open court as to the same subject matter and the proposed Rule does nothing to invade their right to privacy.

Thank you for your time and consideration of my comments.

Very truly yours,

THOMAS C. PHELAN
Attorney at Law

TCP/kth