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Christopher Black chris@blacklawseattle.com

April 30, 2019

Via Email

Washington Supreme Court
supreme@courts.wa.gov

RE: *Proposed Court Rules/Changes to CrR/CrRLJ 3.7, 3.8, 3.9, 4.7 and 4.11*

Dear Supreme Court Justices:

I have been practicing criminal defense in both state and federal courts in Washington since 2001, and have significant practical experience dealing with the issues underlying the proposed rule changes. I have been a member of the Board of Governors of the Washington Association of Criminal Defense Lawyers ("WACDL") since 2009. I am currently the president of the organization.

I write to urge the Court to adopt proposed criminal rules 3.7, 3.8, 3.9, 4.7 and 4.11. I believe that these proposed rules represent reasonable, incremental changes that do little more than keep pace with changing technology, science, and societal norms. Implementation of the proposed rules would have a great positive impact on the criminal justice system in terms of contribution to more just outcomes, while at the same time having little practical negative impact on the administration of justice.

CrR/CrRLJ 3.7 Requiring Recording of Interrogations

The advantage of requiring that interrogations be recorded is that it creates an accurate record of what was said by all parties during the interrogation. This, obviously, could inure to the benefit of either the putative criminal defendant or the prosecuting authority. The ultimate impact of the rule would be that juries or judges would be able to accurately assess what was actually said and more accurately evaluate the credibility of the parties to the interrogation. Additionally, the existence of such a record would often (as it does in current cases where recordings exist) reduce the necessity of pretrial litigation over any potential allegations of coercion or issues regarding provision and/or waiver of Miranda rights. Given the proliferation of the availability of recording devices (i.e. any cellphone, $10 digital pocket recorders, etc.),

and the fact that many officers are already equipped with standard-issued audio and video recording equipment, it is difficult to understand what could justify opposition to this rule. The proposition that it impugns law enforcement by presuming regular malfeasance certainly does not. No matter how well-intended a law enforcement officer is, it is simply not possible to accurately and completely describe an interrogation without a recording.

CrR/CrRLJ 3.8 Requiring Recording of Eyewitness Identification Procedures

Similar to the rule requiring recording of interrogations, this rule seemingly has significant upside with little downside. Again, the net effect is simply to require that a record be made of the actual facts of what happens during eyewitness identifications. Such recordings accurately show whether proper procedures were followed, the degree of certainty of eyewitnesses, and whether any of the eyewitnesses received any suggestion from law enforcement officers, including when it might happen unintentionally. Again, with the universal availability of recording devices that has become a defining trait of our era, it is hard to set forth a principled objection to the proposed rule.

CrR/CrRLJ 3.9 Exclusion of In-Court Identification

This rule is designed to prohibit suggestive identification procedures. It is difficult to imagine a more suggestive identification procedure than to have a witness on the stand asked to identify the defendant, whose identity is unquestionably clear due to the fact of his/her presence inside the bar of the courtroom. Such identifications should be prohibited absent a prior identification made under non-suggestive circumstances.

CrR/CrRLJ 4.7(a)(4) Discovery- *Brady* Obligations

Rule 4.7 already requires prosecutors to disclose evidence favorable to the defense that is in their possession. The proposed amendment to Rule 4.7 simply expands this existing duty in a manner consistent with what the United States Supreme Court already requires, which is that prosecutors must learn of, and disclose, any favorable information from investigative agencies. See Youngblood v. West Virginia, 547 U.S. 867, 869-70 (2006); Kyles v. Whitley, 514 U.S. 419, 437 (1995)("the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police"). The fact that the proposed amendment is controversial in any way is evidence that it is necessary, in that it shows that there is a misperception on the part of prosecutors as to the scope of a duty they already have.

CrR/CrRLJ 4.7(h)(3) Discovery- Redaction

The proposal to permit defense redaction of discovery materials rectifies a situation where many criminal defendants are unable as a practical matter to access discovery in any meaningful way for months after their cases are initiated. These defendants are often the ones who are in custody, because those defendants face the biggest practical barriers to discovery review under the current system. In cases with any substantial amount of discovery, the time it takes for the prosecutor to provide initial discovery, the defense to propose redactions, the

prosecutor to review them, the parties to work out any differences, and in some cases to ultimately seek a decision from the court, is going to be longer than the 60 days allowable for trial of an in-custody defendant. Further, there does not seem to be much, if any, justification for the current rule which necessitates this delay.

CrR/CrRLJ 4.11 Recording Interviews

The proposal to require witnesses to agree that their interviews be recorded or that the jury be instructed regarding refusals promotes justice and reduces inefficiency. As with the proposed requirements that interrogations and eyewitness procedures be recorded, what this rule essentially does is ensure that accurate records are made. This limits unnecessary litigation and promotes fair outcomes, which is good for all parties.

Conclusion

In sum, the proposed rules will contribute to a more just and more efficient system, and will have little, if any, negative impact on any participants in the criminal justice process. The proposals reflect changing norms and best practices. I strongly urge the Court to adopt the new rules. Thank you for your consideration of these comments.

Sincerely yours,

BLACK LAW, PLLC

Christopher Black
Attorney at Law
President, WACDL

Tracy, Mary

From: OFFICE RECEPTIONIST, CLERK
Sent: Tuesday, April 30, 2019 3:46 PM
To: Tracy, Mary
Subject: FW: Proposed Court Rules/Changes to CrR/CrRLJ 3.7, 3.8, 3.9, 4.7 and 4.11
Attachments: 19-04-30 Letter re rules amendments.pdf

From: Chris Black [mailto:chris@blacklawseattle.com]
Sent: Tuesday, April 30, 2019 3:41 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Subject: Proposed Court Rules/Changes to CrR/CrRLJ 3.7, 3.8, 3.9, 4.7 and 4.11

Good afternoon,

Please find attached comments regarding the proposed changes to CrR/CrRLJ 3.7, 3.8, 3.9, 4.7 and 4.11. Thank you.

Chris Black

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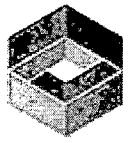

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