

April 29, 2019

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

Re: Proposed Discovery Criminal Rule Changes

Dear Supreme Court:

I write to comment on and urge adoption of the proposed changes to various criminal discovery rules.

I especially urge adoption of the proposed changes to CrR 3.7, which would require police to record interrogations. Two years ago, I had a case where this would have been particularly relevant. My juvenile client was charged with Assault 4, after a teenage girl called 911 and accused him of hitting her at a transit center. The evidence was fairly weak, except for my client's confession. The police report read:

Post Miranda, [REDACTED] stated that he did punch the victim in the face and would not explain further how or why he did it.
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The officer appeared at trial, and before he testified he told the prosecutor that he had just remembered that the incident occurred while his agency was doing a pilot project for bodycams. The prosecutor arranged for the bodycam video to be delivered to court later that afternoon.

Meanwhile, we proceeded with the trial, including the officer's testimony. He presented as affable, sincere, and professional, both on and off the record. He testified consistently with his report, adding that he had read the *Miranda* warnings from a department issued card, including the juvenile warnings, that my client acknowledged understanding the rights, and that he waived them.

The video later arrived at court. After the prosecutor and I reviewed it, the prosecutor offered it into evidence and played the *Miranda* warnings and statement. Knowing what the video showed, I did not move to suppress it. But the judge *sua sponte* mentioned that it was the worst *Miranda* warning he had ever heard. The officer read the warning so quickly that I myself could barely understand him, even though I knew what he was saying. I did not time it, but I believe the officer read the entire warning in less than 10 seconds. Also, he read it over considerable road noise next to a busy intersection; he was standing while the client was sitting on the ground, defeated and

crying, so the client was about six feet away from the officer's voice and looking down; and at no point did the client indicate that he understood the warning, that he waived his right to silence, or indeed that he even heard the warning. This would have been strong grounds to move to suppress the statement, which I believe would have been successful.

However, I did not move to suppress it, because the video finally revealed what my client had actually said. Rather than saying he hit the victim, the video showed this:

Officer: You hit her, didn't you?

Client: You say I hit her.

This exchange directly contradicted the officer's report and testimony. It showed that my client did not confess and in fact denied the assault. Based on the video and the other evidence, the court found the client not guilty.

If I had had the video earlier, I would have given my client different advice about whether to go to trial. I would have been able to impeach the officer, who had lied under oath in open court. I wonder if the State would have even filed the charge if they had known about the officer's lies, the CrR 3.5 problem, and the client's denial instead of confession. If we had not had the video at all, the court would have believed that my client confessed and might very well have found him guilty.

The fact that we ended up with a video at all was a fluke. We had it only because the officer happened to remember the bodycam pilot project and the State was able to obtain the video while the trial was still underway. I wonder how many other cases I've had where the confession was not recorded and where the client was falsely accused and convicted, or where the client pled guilty in the face of false evidence.

The proposed changes to CrR 3.7 would prevent this problem. If all statements were recorded, there would be no question about what the client said, nor would there be any question of the sufficiency of the *Miranda* warnings. I wish we lived in a world where every police officer was perfectly truthful in every case. I believe most officers are in most cases. But to convict a person—in my case, a child—on false evidence from even one officer in one case is a failure of the criminal-justice system at its core. The proposed changes to CrR 3.7 would prevent that injustice, and I urge you to adopt them.

Sincerely,  
Kelly Vomacka  
Attorney at Law

**Tracy, Mary**

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**From:** OFFICE RECEPTIONIST, CLERK  
**Sent:** Monday, April 29, 2019 11:24 AM  
**To:** Tracy, Mary  
**Subject:** FW: Comment on changes to court rules  
**Attachments:** KV letter re ct rules.docx

**From:** Kelly Vomacka [mailto:kelly@vomackalaw.com]  
**Sent:** Monday, April 29, 2019 11:21 AM  
**To:** OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>  
**Subject:** Comment on changes to court rules

Please see my attached comments supporting changes to various criminal discovery rules.

Thank you,  
Kelly Vomacka

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