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

Via email: supreme@courts.wa.gov

RE: Comment on proposed rule changes Cr/CrRLJ 3.7, 3.8, 3.9, 4.7, and 4.11.

To the Washington State Supreme Court: I have been a practicing criminal defense attorney for nearly 30 years, in private and public defense, have over a hundred trials, am a CJA panel member, and was death penalty qualified (ecstatic it is no longer needed in this state, finally). I write to urge adoption of the proposed rules.

Rule 3.7 Recorded Interrogations

As a practicing criminal defense attorney, few things are as frustrating as not being able to see the actual interrogation that produces a confession. I have never had a confession case that did not have the uncertainty of "what really happened" surrounding the confession. Requiring recording is an absolute no brainer here. Why wouldn't you? Well, there are no good reasons. Period. Innocence Project reports that around 30% of DNA exonerations involved false confessions which were unrecorded. Over 50% were under 21 years of age and 35% were under 18. Recording these greatly reduces the chance of false conviction. There are so many ways that recording interrogations adds to the integrity of the evidence they offer, the most important of which is that the Judge can see this evidence and it is no longer occurring in the dark, in a vacuum. The recording of interrogations also protects law enforcement, which has nothing to fear from the process if it is legitimate. Judges and Juries are able to evaluate the evidence and so are experts, there is finally a record of the gathering of this type of evidence that is not in dispute. It is way past time to require the recording of all interrogations. No more guessing.

Rule 3.8 Record Eyewitness Identification Procedure

This is the leading cause of wrongful convictions. We all know the amazing work done right here at the University of Washington by the Loftus's, and it is just amazing that we do not reflect this scientifically valid knowledge in our evidence rules and in the criminal law generally. Over 75% of wrongful convictions contain bad eyewitness id, according to Innocence Project.

Rule 3.9 Exclude first time in Court Eyewitness Identification

Bad eyewitness identification is the leading cause of wrongful conviction. This in court procedure is just so prejudicial and fraught with the potential for error that it should be discontinued and accomplished pretrial using the best practices for id. It shouldn't be fodder for prosecutor's drama.

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Rule 4.7 Brady

The proposed changes conform the rule to the Constitutional requirements of the case. The rule currently requires prosecutors to turn over all exculpatory material in their possession, the law requires that include material held by law enforcement and impeachment material to be the prosecutor's obligation to disclose. This eliminates game playing and disingenuousness between law enforcement and prosecutors and must be done to fully protect the constitutional rights of defendants.
Additionally, part of the rule relates to a fix that allows defense attorneys to perform redaction to share constitutionally mandated material with defendants. This should be approved to guarantee constitutionally protected rights. It's not a meaningful right if you never get to see the evidence against you because of a lazy prosecutor.

Rule 4.11

I would guess that this is the most desired rule change for criminal defense attorneys. This is the situation that comes up most often and causes the greatest trouble for defense attorneys and Judges. Defendants have a constitutional right to pre trial witness interviews. Yet, this right is much less meaningful when no accurate recording of that interview can be compelled. The witnesses cannot be tied to their statements. It is absurd, and there is no legitimate reason that law enforcement should not be required to submit to recording. If any lay witness has a legitimate reason (religion?) they can see the Judge and he can decide which constitutional right is more important. Nothing is more hypocritical than a law enforcement officer manipulating people into recording a statement or not recording an interrogation, and then refusing to be recorded. There is no reason not to require recording to be allowed. None. In terms of guaranteeing the integrity of the offered evidence and the process in general, nothing ensures an accurate record like recording. It is now easier than ever to achieve. This one should be an easy one for the Court to adopt, there is no legitimate reason not to. Not a single one.

In closing, I always note that there are more comments opposing the adoption of the rules. I am guessing that the monolithic responses of the prosecutors' offices accounts for this. I know, and can tell the Court with absolute metaphysical certitude, that the mavericky bunch of criminal defense attorneys really wants and desires and believes in these proposed rule changes and they are very, very important to us, even if most of us are too crazy busy to let you know. I am letting you know.

Douglas Hiatt
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Tracy, Mary

From: OFFICE RECEPTIONIST, CLERK
Sent: Tuesday, April 30, 2019 8:06 AM
To: Tracy, Mary
Subject: FW: comments on proposed rules
Attachments: supreme letter bar.docx

-----Original Message-----
From: Douglas Hiatt [mailto:douglas@douglashiatt.net]
Sent: Monday, April 29, 2019 10:10 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Subject: comments on proposed rules

Hello, please find attached my comments on the proposed rules, thanks, douglas

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