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March 19, 2019

Washington Supreme Court
supreme@courts.wa.gov

Re: Proposed Amendments to CrR 3.7, 3.8, 3.9, 4.7, and 4.11

Dear Supreme Court:

I offer these comments from more than 35 years as a criminal defense lawyer for state court trials and appeals, a volunteer with the Innocence Project Northwest, and local cooperating counsel for The Innocence Project.

The ultimate purpose of the criminal justice system is to distinguish who is guilty and who is innocent. The system relies completely on human beings. Our laws attempt to guide those human beings via a process most likely to reach accurate outcomes.

DNA evidence and the work of the Innocence Network have revealed many sources of human bias and mistaken recollections, resulting in erroneous conclusions of who is guilty. We now know that despite the best intentions of all parties, unintentional biases and mistaken memories lead to inaccurate convictions of innocent people.

Of course, there are just as many cases in which these errors have occurred that do not involve DNA evidence by which we can prove the errors. These proposed rules implement protective procedures to reduce the number of errors in such cases.

Juries are not aware of these inherently human flaws. They rely on our "justice system" to do the initial sort of valid from invalid claims.

It behooves our system to strive for more accuracy. These proposed amendments bring our court system closer to the ideal of justice, using the scientific knowledge garnered from Innocence exonerations.

Electronic recordings, which now permeate our popular culture, are a sensible method of documenting significant steps in the process of building a case. One need not look far to see how recordings conflict with human memory, especially over a period of weeks or

months. The memories may "evolve" over time with reinforcement from the mere process of prosecution. Yet recordings of what occurred will preserve accurate information and disclose later erroneous recollections.

Electronic recordings allow counsel and the courts to focus our energies on the real issues, not on arguing what the facts are.

In my own recent experience, a case involving nearly all professional law enforcement witnesses, many officers declined to be recorded during defense interviews. I had to reschedule the interviews and bring a court reporter, at significant expense to my client. The increased costs affect the entire system when public defenders must take such a route.

Some years back, it was the State's policy never to record interviews of child witnesses. Instead, the system relied on the interviewer taking notes of what the child said, which often excluded what the interviewer asked. When research clearly demonstrated that the questions and methods of asking were at least as important as the answers, the State corrected course. We now have excellent centers that routinely record child interviews, reducing the number of interviews and so the trauma for the child.

These recordings not only assist the prosecution in assessing credibility. They also provide defense counsel an accurate record that can be very convincing for a defendant. Thus they contribute to earlier resolution of cases.

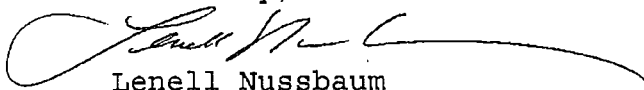
All parties benefit from sharing the recordings before trial. The privacy of any witness is well protected by limiting dissemination.

While many in the system bemoan the inconvenience of making recordings, in fact the child interview system demonstrates how we can respond effectively and consistently to reach better outcomes for everyone. The same can be done for suspect questioning and identification procedures.

The proposed amendments to CrR 4.7 appear merely to implement what the Constitution already requires, under *Kyles v. Whitley*. It is helpful to have these standards incorporated. I have experienced prosecutors arguing their obligations are limited to the rules.

I strongly urge the Court to adopt the proposed amendments.

Sincerely,



Lenell Nussbaum

Tracy, Mary

From: OFFICE RECEPTIONIST, CLERK
Sent: Tuesday, March 19, 2019 2:04 PM
To: Tracy, Mary
Subject: FW: Comments to Proposed Rule Amendments
Attachments: Comments on Rule Changes to Supreme Court.pdf

For you.

From: Lenell Nussbaum [mailto:lenell@nussbaumdefense.com]
Sent: Tuesday, March 19, 2019 1:56 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Subject: Comments to Proposed Rule Amendments

Please see the attached letter for comments on proposed amendments to CrR 3.7, 3.8, 3.9, 4.7 and 4.11.

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