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March 21, 2019

Washington Supreme Court
PO Box 40929
Olympia, WA 98504-0929
Via US mail and email: supreme@courts.wa.gov

RE: Public Comments requesting the Supreme Court to Adopt CrR/CrRLJ 3.7, 3.8, 3.9, 4.7, and 4.11

To the Washington Supreme Court:

I write to urge the Washington Supreme Court to adopt the following proposed rules:

CrR/CrRLJ 3.7 – Recorded Interrogations

The Innocence Project reports that, since 1989 and based on DNA evidence, 354 people have been exonerated of crimes they did not commit. Of those 354 cases, 70 % involved eyewitness misidentification. 28 % involved false confessions. 51 % of the false confessors were 21 years old or younger at the time of arrest. 35 % of the false confessors were 18 years old or younger at the time of arrest. 10 % of the false confessors had mental health or mental capacity issues. *See* https://www.innocenceproject.org/dna-exonerations-in-the-united-states/ .

The Washington Association of Criminal Defense Lawyers is proposing this rule to try to improve the reliability of evidence. Having a full record of an interrogation will allow a jury to hear all questions that were asked and all answers that were given. Juries are not left to hear *about* the interrogation by law enforcement, but rather can hear the entire interrogation. This also allows the defense and experts to assess the interrogation itself. Recording the entire interrogation also protects law enforcement from false allegations of coercion or other misconduct. Having a full record of interrogations protects the fairness and integrity of our court system and will help reduce the number of wrongful convictions.

CrR/CrRLJ 3.8 – Record Eyewitness Identification Procedure

As the Innocence Project has shown, eyewitness identification is the leading cause of wrongful convictions. Having a full and accurate record of the eyewitness identification procedure will help improve the reliability of eyewitness identification evidence by permitting the jury and expert witnesses to assess the actual identification procedure itself, they will not be limited by a third person's account of the identification procedure.

More complete, objective and accurate account of the identification procedure will help to improve the reliability of evidence.

CrR/CrRLJ 3.9 – Exclude First Time In-Court Eyewitness Identifications

As the Innocence Project as shown, mistaken eyewitness identification is the leading cause of wrongful convictions. In-court identifications are very suggestive. There is generally the single defendant sitting at defense counsel table. It is unfair and unduly suggestive to have a witness identify for the first time the single defendant as the perpetrator of a crime long after the crime itself occurred. The identification procedure should be conducted pretrial following best practices.

CrR/CrRLJ 4.7 – Discovery (*Brady* Fix and Redacted Discovery)

The current version of CrR/CrRLJ 4.7(a)(3) and (4) provide for exculpatory evidence in the possession of the prosecutor. The rule does not extend to information held by law enforcement and does not extend to impeachment material. These rules do not comply with the prosecutor's obligations under *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963) and its progeny, which requires the prosecutor to provide to the defense all exculpatory information and impeachment material whether in the possession of the prosecutor or in the possession of law enforcement. The court rule should accurately reflect federal constitutional requirements.

CrR/CrRLJ 4.7(h)(3) would permit the defense to redact discovery and then provide it to a defendant without approval of the court or of the prosecutor. Currently redacted discovery can sit on a prosecutor's desk for days, weeks and sometimes months without being reviewed for approval. This proposed rule would recognize that defense attorneys are officers of the court and can make appropriate redactions without prosecutorial oversight. I have had several cases where the prosecutor never reviewed redacted discovery or review it only after motions to compel. This rule would ease the burden of prosecutors and is more efficient and effective for getting copies of discovery to defendants.

CrR/CrRLJ 4.11 – Recorded Witness Interviews

Defendants have a constitutional right to pretrial witness interviews. However, there is no requirement that an attorney may audio record or have a court reporter present at pretrial interviews, over the witness' objection. Without a recorded interview the witness cannot be held to the words that are spoken. A witness may change a statement or answer to a question between the interview and the trial and there is no way for the attorney to impeach that witness. The truth-finding function of the courts and fundamental fairness require that attorneys be permitted to have an accurate account of pretrial interviews, even over the witness' objection. This rule also contains a provision where the witness may not consent to being recorded and the judge can determine to the reason for such refusal and may fashion an appropriate instruction based on the witness' reasons for

refusing to be recorded or have a court reporter. This will help ensure the accuracy of evidence and the fairness of trials.

Sincerely,

Jennifer Horwitz

Tracy, Mary

From: OFFICE RECEPTIONIST, CLERK
Sent: Thursday, March 21, 2019 2:50 PM
To: Tracy, Mary
Subject: FW: Proposed Rules
Attachments: Letter to WA Supreme Court.pdf

Importance: High

From: JenniferHorwitzLaw [mailto:jennifer@jenniferhorwitzlaw.com]
Sent: Thursday, March 21, 2019 2:42 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Subject: Proposed Rules
Importance: High

My letter is attached.

Thank you!

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