Tracy, Mary

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Sent: Tuesday, April 30, 2019 4:40 PM
To: Tracy, Mary
Subject: FW: PROPOSED CHANGES TO CRIMINAL RULES

From: John Ziegler [mailto:zieggie@hotmail.com]
Sent: Tuesday, April 30, 2019 4:39 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Subject: PROPOSED CHANGES TO CRIMINAL RULES

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April 30, 2019

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

Re: Proposed Court Rules CrR 3.7, 3.8, 3.9, 4.7, and 4.11

To the Justices of the Washington State Supreme Court:

I am writing in support of the several court rules proposed by the Washington Association of Criminal Defense Lawyers. I have been a criminal defense attorney in the State of Washington for 45 years and have experienced the shortcomings of the present rules repeatedly during that time. Presently I provide more than 1500 hours per year to assisting other criminal defense attorneys with support, advice and mentoring; in cases where my expertise may be of value to defense counsel, I am always willing to appear in court proceedings. Since November, 1997, every minute of my work has been performed without fee.

The rules requiring the recording of identification procedures (Prop. CrR/CrRLJ 3.8) and witness interviews (CrR/CrRLJ 4.11) are nothing more than common-sense procedures bringing Washington into step with long-established technology. I am astonished that certain police and prosecuting attorneys could even oppose such reasonable steps which will allow courts to review events as they occurred, rather than be forced to rely on the often-flawed narrations made after the fact.

The proposed CrR/CrRLJ 4.7 additions to clarify the need for prosecutors to furnish all exculpatory materials to counsel for the defendant is already required by the U.S. and State Constitutions, and the proposed rule merely clarifies the State's discovery obligations under cases more than a half-century old,

beginning with *Brady v. Maryland*, 373 U.S. 83 (1963). The absence of these requirements under the present rule have encouraged law enforcement to withhold exculpatory information from the prosecutors and defense, and regrettably encourage prosecutors to withhold the information from the defense. The proposed rule merely clarifies what the Constitutions already require.

I am writing primarily in support of proposed CrR/CrRLJ 3.7, requiring the recording of all interrogations by police of witnesses and suspects. The very first appellate brief I ever wrote was during law school, and involved a gentleman charged with second degree murder. *State v. Joseph*, 10 Wn.App. 827 (1974). The interrogating policeman claimed that the defendant "confessed" to facts which negated the claim of self-defense, but admitted that he had not provided warnings to the defendant required by *Miranda v. Arizona*, 384 U.S. 436 (1966). This failure renderd the defendant's alleged "confession" inadmissible in the opening of the State's case-in-chief, but because the defendant testified at trial the alleged "confession," if otherwise constitutionally "voluntary," could be admissible as impeachment evidence under *Harris v. New York*, 401 U.S. 422 (1971). **Mr. Joseph adamantly denied making the alleged inculpatory statements**. Because the trial court had not conducted a hearing (presently required by CrR/CrRLJ 3.5) into the constitutional "voluntariness" of the alleged "confession," the appeals court remanded it to the King County Superior Court for the required hearing.

Still a law student, I conducted the very strange remand hearing. Because the defendant denied the alleged "confession," the trial court was forced to rule upon constitutional "voluntariness" of any statements based solely upon the policeman's version of the events. The trial court ruled the "confession" to be constitutionally "involuntary" based on the police testimony, IF it had even occurred!

In my 1973 briefing before the Court of Appeals, I contended that evidence of the alleged "confession" should be excluded because the policeman COULD HAVE recorded the interrogation, which would have conclusively determined whether the "confession" even happened. The law did not require recording then, and the law does not require recording now.

THAT WAS MORE THAN 45 YEARS AGO. The technology for recording was readily available in 1972, and is more readily available now. Because of inconsistencies and outright improbabilities in the policeman's testimony, it is likely that Mr. Joseph was truthful in his claim that the "confession" never happened. We cannot know, solely because courts did not require that which technology made simple. This lead to a hearing where the court had to rule on the legal significance of a story that was probably untrue!

Mr. Joseph was fortunate in prevailing, but it was a fluke based upon unbelievable police testimony. We are all aware that at least several hundred actual confessions have been tricked, cajoled, threatened or beaten from demonstrably innocent defendants. Those like Mr. Joseph, who deny even confessing, may well be telling the truth, but in any "swearing contest" between hard-working policeman and possibly-guilty defendant, the defendant will always lose, and this will necessarily include those that are innocent.

It is time that police procedures be memorialized, particularly because the technology for doing so has been available since long before the 1966 *Miranda* decision.

Very Truly Yours,

/s/

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