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30 April, 2019

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

**RE: Proposed Changes to the Criminal Rules**

To Whom It May Concern:

Since July of 2002 I have been practicing almost exclusively public criminal defense (misdemeanors and felonies), and I write this letter to urge you to adopt the following proposed changes to the criminal rules:

**CrR/CrRLJ 3.7 - Recorded Interrogations**

This change is needed to strengthen the integrity of the entire investigative process. All of us have seen or heard the data about the percentages of false confessions that occur in this country. The Innocence Project reports that 354 persons have been exonerated of criminal convictions since 1989 based on DNA evidence, and that 70% of those criminal convictions involved eyewitness misidentification and 28% have involved false confessions stemming from various other issues (youth, mental health issues, etc.). Interviews do not consist solely of spoken words. They consist of voice intonation, double meanings and hyperbole, misspoken statements and malapropisms, scattered statements broken up by interruption from other participants, etc. The best way to allow all involved in the criminal justice process to properly evaluate and interpret interrogations is to require them to be at least audio-recorded. This is simply common sense.

You may recall the movie "My Cousin Vinny" in which Billy Gambini is being questioned by the sheriff. When the sheriff asked him, "At what point did you shoot the clerk?" Billy twice responded, "I shot the clerk. I shot the clerk." in an intonation that sounds like an affirmative statement but which was obviously his way of asking, "You're accusing me of shooting the clerk?" While perhaps a

bit hyperbolic, this fictionalized "confession" is precisely the sort of thing that can actually happen when we are forced to rely on interrogation summaries on paper prepared by police officers, sometimes days after the fact, and which we all know can be colored by what the officers want to hear rather than what was actually said. Requiring that all interrogations of defendants be recorded will not only protect defendants, but it will also help to protect law enforcement from false accusations of misconduct on their part.

#### **CrR/CrRLJ 4.11 - Recorded Witness Interviews**

Defendants have a constitutional right to pretrial interviews of all witnesses. However, with no requirement that those interviews be recordable the witnesses cannot be effectively held to what they say during those interviews, and it is much more difficult to clarify contradictory statements made by a witness at different times when a previous statement was not recorded. It also opens up another line of attack for opposing counsel to use.

This very thing occurred to me during a juvenile court trial in August of 2017. The two alleged victims would not agree to be audio recorded during our pretrial interviews of them and the court subsequently denied my motion to depose them. My investigator and I were then left with taking handwritten notes of the interviews, and since time was limited we both opted to simply write down summaries of the witnesses' answers without writing down the questions as well. Later at trial the prosecutor then repeatedly berated what my investigator had to say about the alleged victims' statements during our interviews by pointing out that he had not written down any of the questions, arguing that therefore the "entire context" of our interviews was missing and that therefore my investigator's testimony of what the alleged victims had said to him was not credible.

#### **CrR/CrRLJ 3.8 - Recording of Eyewitness Identifications**

The Innocence Project has shown that mistaken eyewitness identification is the leading cause of wrongful convictions. Providing for the full, accurate preservation of eyewitness identification procedures will improve the integrity of the process, and will improve its reliability by giving all parties involved in a case the opportunity to assess for themselves the identification procedures used (as opposed to being limited by a third party's account of how the procedures were carried out).

### CrR/CrRLJ 3.9 - Exclusion of First-Time, In-Court Identifications

The Innocence Project has shown that mistaken eyewitness identification is the leading cause of wrongful convictions, and in-court identifications are strongly and unfairly suggestive. The procedure for having persons identify other persons should be conducted prior to trial following best practices.

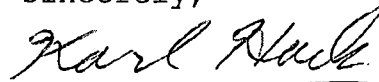
### CrR/CrRLJ 4.7 - Brady Fix and Redacted Discovery

CrR/CrRLJ 4.7(a)(3), (4) - The current versions of these rules discuss exculpatory evidence possessed by a prosecutor. They do not cover exculpatory information possessed by law enforcement, and they do not extend to impeachment material. Therefore, they do not comply with a prosecutor's obligations under Brady v. Maryland (373 U.S. 83 (1963)) and its progeny, which require prosecutors to provide to the defense all exculpatory information and impeachment material relevant to a given case, regardless of whether that information is held by prosecutors or by law enforcement. The proposed fix to these rules simply brings them in line with constitutional requirements.

CrR/CrRLJ 4.7(h)(3) - The proposed version of this rule would allow the defense to provide to defendants redacted discovery for their use without requiring that the redacted discovery be first reviewed by the court or by the prosecutor. While I have not had significant problems in my practice with prosecutors taking an inordinate amount of time to do their reviews of redacted discovery, there are apparently many prosecutors who either take much too long to perform this task or who simply wait for the defense to file motions to compel them to do it. As officers of the court we defense attorneys should be trusted to perform this task without prosecutorial oversight, especially where time is of the essence (i.e., incarcerated defendants).

Thank you very much for time and consideration of my input.

Sincerely,



Karl A. Hack  
Attorney at Law

**Tracy, Mary**

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**From:** OFFICE RECEPTIONIST, CLERK  
**Sent:** Tuesday, April 30, 2019 3:59 PM  
**To:** Tracy, Mary  
**Subject:** FW: Comment on Proposed Changes to Criminal Rules  
**Attachments:** Letter Re Criminal Rule Change Proposals.PDF

**From:** Karl Hack [mailto:Karl-Hack@comcast.net]  
**Sent:** Tuesday, April 30, 2019 3:51 PM  
**To:** OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>  
**Subject:** Comment on Proposed Changes to Criminal Rules

To Whom It May Concern:

Please forward the attached letter to the proper persons for their consideration of these proposed changes to the criminal rules. Thank you very much.

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