Snohomish County Public Defender Association
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April 30, 2019

Washington Supreme Court
PO Box 40929
Olympia, Washington 98504-0929
Sent via email: supreme@courts.wa.gov

RE: Public Comments requesting the Supreme Court to Adopt CrR/CrRLJ 3.3, 3.7, 3.8, 3.9, 4.7 and 4.11

To the Washington Supreme Court,

I am the Managing Director at the Snohomish County Public Defender Association (SCPDA). We provide representation to criminal cases in Snohomish County Superior Court, Snohomish County District Court, Skagit County Superior Court, and in Edmonds Municipal Court. On behalf of the 104 public defender professionals working at SCPDA, we urge you to adopt the proposed rules outlined above.

CrR/CrRLJ 3.3 – Time for Trial

The Snohomish County Prosecutor's Office's practice of filing felonies into Snohomish County District Court and request bail is very detrimental to indigent clients. This is general and wide-spread practice and includes felonies from all serious levels. Wealthy clients post bail. Indigent clients remain jailed, are substantially less likely to assert their constitutional rights, and more likely to pled guilty just to secure their release from jail. Approximately, 50% to 60% of the felony cases filed into district court "move" to Superior Court (meaning filed in Superior Court) at the end of the felony dismissal date. The proposed rule change will incentivize the prosecutor's office to use the practice of filing a felony in district court more strategically and it will treat clients more similarly in all 39 counties of Washington.

The practice of filing felony cases into district court not only impacts defendants right to speedy trial, but also access to discovery, ability to preserve defense evidence, and other issues related to ability to participate in your own defense.

This rule change is just one step toward greater fairness. This rule will not curb the problem that indigent defendants serve more jail time (often more jail time than the prosecutor's plea offer at arraignment.) It does not curb the problem of indigent defendants suffering from serious mental health issues experience delays entering RCW 10.77 orders. The rule does not address that the Snohomish County Prosecutor's Office practice is not consistent with CrRLJ 3.2.1; as a matter of long-standing practice, the Snohomish County Prosecutor's Office does not seek or schedule a preliminary hearing.

Overall, this proposed rule change is an important step to reconcile CrR 4.1, CrRLJ 3.2.1, and CrR 3.3. We support the change.

CrR/CrRLJ 3.7 – Recorded Interrogations

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. In this modern age, this requirement would not hinder police investigations and only strengthens the reliability of those investigations.

I had the opportunity to litigate a CrR 3.5 hearing with a recorded interrogation. The issue was whether the defendant had waived his Miranda rights. He had signed a preprinted form and the question was whether he understood what he was signing. We introduced evidence of the defendant's blood alcohol level which was a .24 (he was injured in a fight and blood was taken at the hospital). And yet three of the four police officers testified at the CrR 3.5 hearing that they did not observe the defendant to be intoxicated or smell the odor of alcohol. The fourth officer indicated that he was a smoker and did not have much sense of smell. The recording of the defendant's voice, his manner, and the pauses in his speech, were critical to establishing that he was extremely intoxicated. He signed the form as instructed, but he was repeatedly saying he did not want to waive his rights. This hearing was litigated in 2003 or 2004. The technology of sound recording, or video recording, has gotten less expensive, more user friendly, and should be required by the rule. It is critical evidence that needs to be preserved.

CrR/CrRLJ 3.8 – Record Eyewitness Identification Procedure

Eyewitness identification is the one of leading causes of wrongful convictions. Witness misidentification is a factor in 70% of post-conviction DNA exoneration cases. Research

shows nonidentifications correlate with a suspect's innocence, not their guilt. However, despite the research, witness identifications remain compelling to jurors. Jurors have been found to inflate the value of identification testimony where other evidence of the case is weak, such as confessions, forensic science, or informants. *State v. Henderson*, 208 N.J. 208, 236-37 (2011).

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

In-court identifications are a very suggestive identification practice. According to the Innocence Project, in 53% of wrongful conviction cases there was an in-court (mis)identification of the defendant. 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. 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

More and more police officers and troopers are refusing to be recorded. It is confounding that a professional witness would refuse to have a verbatim transcript of the questions and answers. We have offered to provide a copy of the recording to the witness and the prosecutor after the interview. The prosecutors often coach law enforcement to cooperate with recording the interview. However, without clarity in the court rule, the current trend is that more and more police officers are refusing to be recorded.

The defendants' constitutional right to pretrial witness interviews is weakened when police officers can refuse to be recorded in a pre-trial interview. 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.

Thank you for the opportunity to provide input. We support these changes.

Sincerely,

Kathleen Kyle
Managing Director

Tracy, Mary

From: OFFICE RECEPTIONIST, CLERK
Sent: Tuesday, April 30, 2019 4:55 PM
To: Tracy, Mary
Subject: FW: SCPDA letter of support of court rule changes
Attachments: img-430165114-0001.pdf

-----Original Message-----
From: Kathleen Kyle [mailto:kkyle@snocopda.org]
Sent: Tuesday, April 30, 2019 4:54 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Subject: SCPDA letter of support of court rule changes

To the Justices at the Washington Supreme Court,

Please find the attached letter in support of the court rule changes.

Thanks,

Kathleen Kyle

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