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April 29, 2019

Washington Supreme Court
PO Box 40929
Olympia, WA 98504-0929 *Via 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 State Supreme Court:

I write to urge the Washington State 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. Approximately 75% of all DNA exonerations include mistaken eyewitness identification as contributing to the wrongful conviction. 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.

The current legal framework for these issues is clearly not working. The rules suggested are easy to implement, will improve the reliability of evidence and will make trials fairer to all involved, including law enforcement, witnesses, victims and defendants.

There are many comments opposed to the proposed rules. Although not an exhaustive list, I will address some of the raised by those opposed to the proposed rules.

1. One comment opposing the rules stated that "...these proposals seem to create more problems than solutions. The problems arise from imposing bright-line bars and/or requirements in circumstances that require thoughtful analysis and balanced decision making, not to mention case-specific factfinding."

   CrR/CrRLJ 3.7 has presumption of recording, not a bright-line rule. There are five listed exceptions. In addition to the exceptions, the State may still overcome the presumption by showing by clear and convincing evidence that the unrecorded statement is nevertheless reliable.

   CrR/CrRLJ 3.8 has a presumption of recording, also not a bright-line rule. Video recording is preferred, audio recording is the preferred alternative if video recording is not available, If neither are available, a detailed report should be written. The rule does not contain a "shall" rather the rule states "...*should* be fully documented":

   All identification procedures and related interviews conducted with any victim/witness should be fully documented. Video-recording should be used when practicable.

   And similarly, the remedy section for violation of the rule contains many exceptions:

   If the record that is prepared is lacking in important details as to what occurred at the out-of-court identification procedure, and if it was feasible to obtain and preserve those details, the court may, in its sound discretion and consistent with appropriate case law, declare the identification inadmissible, redact portions of the identification testimony, admit expert testimony, and/or fashion an appropriate jury instruction to be used in evaluating the reliability of the identification.

   CrR/CrRLJ 4.11 also is not a bright-line rule. It provides that a witness may refuse to be recorded. The parties can then engage in a thoughtful and carefully considered analysis as for the reasons for the refusal to be recorded, and then, depending on the reasons for the refusal, the court could give a jury instruction addressing the specific facts of that case, if warranted.

   Rather than being a bright-line rule, these rules give guidance and direction to all parties and to the trial court such that all parties and the court could engage in a thoughtful analysis and balanced decision based on case specific factfinding, while at the same time improving the reliability and objectivity of the evidence.

2. Many comments addressed the added cost. It is unlikely that there will be any additional cost. These rules will actually save money in report costs. Rather than have to write a report based on notes, an officer who takes a witness statement, conducts an interrogation, or administers an eyewitness identification procedure can simply write in their report regarding the statement or procedure "See Recorded Statement."

   The cost of storage is less expensive than storing paper. Having the procedure or statement digitally recorded saves the cost of scanning.

3. One comment suggested that there was insufficient constitutional or case law support for the rules.

   It should be noted that the Washington Association of Criminal Defense Lawyers WACDL) submitted over 200 pages of supplemental material supporting its suggested rules. The supporting documents included constitutional support, case law support, statistical support and many other supporting documents and information. The Supreme Court did not publish the extensive supporting documentation that WACDL submitted.

   I would request that the Court publish the supporting materials and extend the deadline for public comments as there is clearly interest in the supporting material, and there is clearly a negative inference from the lack of publishing the supporting materials. More information and input can only help the decision-making process.

Sincerely,

Kent W. Underwood
Attorney at Law

Tracy, Mary

From: OFFICE RECEPTIONIST, CLERK
Sent: Monday, April 29, 2019 3:55 PM
To: Tracy, Mary
Subject: FW: public comment for CrR/CrRLJ 3.7, 3.8, 3.9, 4.7, and 4.11
Attachments: ltr 4-29-19 wssc, rules.pdf

From: Kent W. Underwood [mailto:kent@underwoodlaw.us]
Sent: Monday, April 29, 2019 3:52 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Subject: public comment for CrR/CrRLJ 3.7, 3.8, 3.9, 4.7, and 4.11

Dear Supreme Court Clerk,

Attached please find my letter in support of the Washington State Supreme Court adopting the above-referenced proposed rules in a non-zipped file format.

Sincerely,

Kent W. Underwood

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