April 26, 2019

Washington State Supreme Court
supreme@courts.wa.gov

Honorable Justices of the Supreme Court:

I urge you to adopt the proposed Court Rules 3.7, 3.8, 3.9, 4.7 and 4.11.

The criminal justice system relies on human beings, with biases and prejudices that color their opinions and judgments. We must strive for more accuracy in our justice system. The proposed amendments to our criminal court rules bring our justice system closer to one we can be proud of. These amendments are based on scientific knowledge, and information gathered from Innocence Project exonerations. We are continually learning how the system gets it wrong and striving to right those wrongs. These amendments move us in the right direction and I urge to support them all.

CrR 3.7 – Requiring Interrogations to be Recorded

Recording interrogations ensures transparency. Recorded interrogations allow both parties to assess how questions are asked and how answers are given. They clearly document that *Miranda* warnings are given prior to questions being asked. Recording can assist the prosecution in assessing an accused's credibility. They also provide defense counsel with an accurate record that can be helpful for a defendant's decision whether to testify or not. A recorded interrogation can help assist in early resolution of cases. All parties benefit from recording interrogations—no one can claim things were said or done—there is a recording that protects everyone.

In the present system. It is a police officer's choice as to what words a jury and/or a factfinder will hear concerning interrogations made of suspects accused of a crime. Rather than hear the actual words spoken in a recording, police officers often paraphrase and/or pick and choose from notes they take what words and thoughts to attribute to a person being interrogated.

Even in counties without these technological capabilities, interrogations can easily be audio recorded with the use of a recording device. Such devices are not expensive to purchase nor are they burdensome for officers to carry. In most cases it would be as simple as downloading an application on a phone.

CrR 3.8 – Recording Eyewitness Identification Procedures

The Washington Association of Prosecuting Attorneys has already endorsed this practice in it's Model Policy on Eyewitness Identification – Minimum Standards, adopted on April 16, 2015. In fact, WAPA's own *minimum standards* state that all interviews and identification procedures with victims/witnesses should be **fully documented** by video recording or audio recording when practicable. The proposed amendment to the rule states the same.

There are many reasons recording this critical part of an investigation is important. First, it allows the attorneys, judge, and jury to analyze how the witness was admonished prior to the

identification. Second, it allows the attorneys, judge and jury to see any hesitation or confusion by the witness prior to an identification. It ensures that there is no subtle suggestion by law enforcement. Accurate eyewitness identifications lead to accurate convictions. But sloppy procedures by law enforcement often lead to inaccurate identifications, wrongful convictions, and later exonerations.

We know that faulty eyewitness identification is one of the top reasons for wrongful convictions. The Innocence Project reports that, since 1989, 351 people have been exonerated of crimes they did not commit through DNA evidence. Of those 351 cases, *71 percent involved mistaken identity.*[1]

CrR 3.9 – In Court Eyewitness Identification

This outdated way of allowing a witness to identify the defendant in court is minimally probative and highly prejudicial. Without a documented accurate *out of court* identification, making an in-court identification of a defendant is simply too suggestive for be probative, and is grossly misleading to a jury.

Research shows that out-of-court identification procedures can irreparably taint the reliability of an in-court identification when the out-of-court identifications resulted in no identification or a misidentification of a filler. Neil v. Biggers, 409 U.S. 188, 93 S. Ct. 375, 34 L. Ed. 2d 401 (1972).

As the Connecticut Supreme Court recently found, there could hardly be a more "suggestive identification procedure than placing a witness on the stand in open court, confronting the witness with the person who the state has accused of committing the crime, and then asking the witness if he can identify the person who committed the crime." State v. Dickson, 322 Conn. 410, 423-24, 141 A.3d 810 (2016). Research also shows nonidentifications correlate with a suspect's innocence, not his guilt. Steven Clark, et al., *Regularities in Eyewitness Identification*, 32 Law & Hum. Behav. 187, 211 (2008).

For these reasons, courts should require there be a positive out-of-court identification procedure prior to any in-court identification of a defendant.

CrR 4.7(a)(2)(iv) – Requiring Prosecutors to Disclose all Records related to Identification Procedures

This proposed amendment simply adds that all records, including notes, reports, and electronic recordings relating to an identification procedure be provided to the defendant. This includes identifications made or attempted to be made.

Identifications attempted to be made that were *not* successful and/or helpful to the state's case must be disclosed anyway under Brady v. Maryland, 373 U.S. 83 (1963) ("The of evidence favorable to an accused violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."); Giglio v. United States, 405 U.S. 150 (1972) (The rule stated in Brady applies to evidence undermining witness credibility); Kyles v. Whitley, 514 U.S. 419 (1995) (The duty to disclose evidence requires a prosecutor to learn of any favorable evidence known to the others acting on the government's

[1] https://www.innocenceproject.org/dna-exonerations-in-the-united-states/

behalf including the police."; United States v. Agurs, 427 U.S. 97 (1976) (Duty to disclose Brady evidence even when there has been no request by the accused); and United States v. Bagley, 473 U.S. 667, 676, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985) (Brady duty encompasses impeachment evidence as well as exculpatory evidence.)

This rule merely clarifies what the law already requires.

CrR 4.7(a)(4) – Clarifying Prosecutor's Brady Obligations

Prosecutors are already required to disclose any material or information within the prosecuting attorney's knowledge which tends to negate a defendant's guilt as to the offense charged. CrR 4.7(a)(3). However, constitutionally required obligations under Brady v. Maryland, 373 U.S. 83 (1963); Giglio v. United States, 405 U.S. 150 (1972); Kyles v. Whitley, 514 U.S. 419 (1995); United States v. Agurs, 427 U.S. 97 (1976), also require the state to disclose material and information which **tends to impeach any state witness**. United States v. Bagley, 473 U.S. 667, 676, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985) (*Brady* duty encompasses impeachment evidence as well as exculpatory evidence.) **CrR 4.7(a)(3)** should be amended to reflect both *exculpatory* and *impeachment* evidence.

In addition, as of now, CrR 4.7(a)(4) limits the state's Brady obligations to "material and information within the knowledge, possession, or control of members of the prosecuting attorney's staff." This statement is in direct conflict with controlling United States Supreme Court law. Kyles v. Whitley, 514 U.S. 419 (1995), specifically held that the scope of the duty to disclose evidence includes the individual prosecutor's duty "to learn of any favorable evidence known to the others acting on the government's behalf ... including the police." Further, due process requires disclosure of any evidence that provides grounds for the defense to attack the reliability, thoroughness, and good faith of the police investigation, to impeach the credibility of the state's witnesses, or to bolster the defense case against prosecutorial attacks.

Sadly, although prosecutors and police officers want us to just "trust" that they will comply with Brady v. Maryland, we know from case after case that we need to enforce the rules and law when it comes to requiring disclosure of exculpatory and impeachment material. This rule simply clarifies what the case law already requires. It does not attempt to stretch the case law any further than it already plainly reads.

I wrote this proposed amendment. I am passionate about the need for further education and enforcement surrounding a prosecutor's obligations under Brady v. Maryland. WACDL has been gathering information about how various prosecutor offices around the state obtain Brady information, keep Brady lists, and disseminate Brady information to defense counsel. There is no uniform approach, and results vary widely. In some counties, there are no Brady lists, and no procedures or policies governing how the state assures it complies with obligations under Brady v. Maryland and progeny.

That is scary. As a devoted criminal defense attorney, the only way we know whether there is exculpatory or impeachment evidence is if a prosecutor tells us. We rely on the state to understand its Brady obligations and comply with them.

CrR 4.7(h)(3) – Allowing the Accused Better Access to their Discovery

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. Tlris rule would ease the burden of prosecutors and is more efficient and effective for getting copies of discovery to defendants.

CrR 4.11 – Recording Defense Witness Interviews

Why is it that the civil court rules provide for greater protections and evidence gathering than the criminal court rules?

Most of the time, civilian witnesses and law enforcement officers agree to be tape recorded during defense witness interviews. There are, however, a number of officers who simply refuse to be recorded because they know that it will be harder to hold them accountable to what they say during the interview and decrease an accused's opportunity to impeach the officer if his or her statement changes at trial. This is an obstruction tactic that unfairly prejudices criminal defendants' right to confront and impeach witnesses against them.

Requiring defense attorneys to bring an impeachment witness to every interview, take meticulous word-for-word notes, and ensure the impeachment witness is available for trial adds another layer of unfairness for criminal defendants. It is burdensome, wastes resources, costs the county and city tax payers more money (to fund more hours for investigators' presence) and is so easily fixed by this rule.

This proposed rule applies to both parties, thereby allowing more transparency and accountability for all witness interviews, whether it is a state witness interview or a defense witness interview.

I urge you to adopt these proposed criminal court rules or enact a workgroup to consider revising and crafting the rules.

Thank you for your consideration of my comments.

Respectfully,

Kevin Griffin, WSBA #38740
Defense Attorney
Thurston County Public Defense