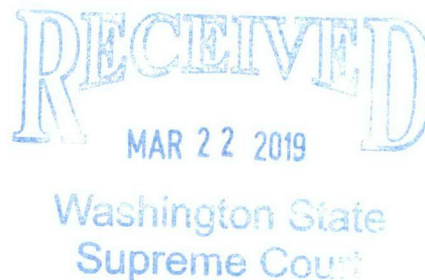


March 20, 2019



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

RE: Proposed Amendments to CrR 3.7, 3.8, 3.9, 4.7, and 4.11

To Whom it May Concern:

I am writing this letter in support of the proposed changes to the above Criminal Rules. My thoughts and opinions are based on over 20 years of experience practicing criminal law including 12 as a Deputy Prosecuting Attorney for King County.

Purpose: As a backdrop to this discussion it behooves us to remember that the ultimate goal of our criminal justice system is ensure that those who are convicted of a crime are, in fact, guilty. This is the basis of the Blackstone Ratio which states that it is better that ten guilty persons escape than that one innocent suffer. And while we, as a community, pay lip-service to this proposition, we fail to live up to it time and time again. Thus, it has become dishearteningly common to learn that yet another innocent person has been exonerated, usually after years of sitting in prison, by newly discovered or recently tested evidence. It leads one to wonder how many other innocent people are sitting in prison right now that we will never learn about.

Easy to Implement: The advent of digital recording devices (both audio and video) has made recording interactions both useful and extraordinarily easy. In fact, we are at the point where it is more surprising when a significant event is not recorded than when it is. Because of this, police and prosecutors have deployed recording devices en masse including in-car audio/video recorders and body cameras along with department issued cell phones, cameras, and digital audio recorders. In addition, police and prosecutors aggressively pursue evidence that may have been recorded by others (either wittingly and unwittingly) from devices in cars, computers, phones, etc., which capture and maintain everything from internet searches to location evidence.

Thus, it baffles me when I read comment after comment from prosecutors complaining that requiring the use of recording devices during significant investigatory events will be over-burdensome to police and will violate privacy. These are the exact same significant investigatory events that lead to conviction and incarceration of our fellow citizens. Are we really asking too much when we seek to ensure that those events can and will be accurately relayed in court?

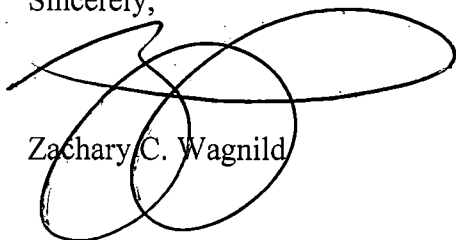
Effect: I have witnessed, both as a prosecutor and as a defense attorney, evidence which I knew or had reason to believe was inaccurate being presented in court. In every instance I have sought to either prevent the evidence from being introduced or to limit its impact by bringing all other important evidence to light. Nevertheless, every time it happens it strikes me how many other times it may have happened that I did not know about. After all, if an investigator omits significant information from his/her report (either intentionally or unintentionally) how would I know?

Personal Experience: In my own experience I recently tried an assault case in which my client was claiming he acted in self-defense. He had been interrogated by a police officer who was wearing a microphone for an in-car audio/video system but because the officer was out of range during the interrogation none of it was recorded. In his report the officer wrote that my client admitted to the assault but said nothing of being under attack or acting in self-defense. Fortunately for my client, upon closer inspection of the recording it turned out that a small portion of the interrogation was recorded when he was being taken to the patrol car by the interrogating officer. In that portion my client can be heard telling the interrogating officer that he was being attacked and thought he was going to be killed. Ironically, the officer could then be heard telling my client that he understood that he was acting in self-defense and that he would include that fact in his report. He did not.

When the State called the officer at trial to testify to the jury that my client made no mention of having acted in self-defense during the interrogation, it was that small portion of the interrogation that was recorded that allowed us to show the jury that the officer's report was inaccurate. My client, a business student at the University of Washington named Jarred Ha, was ultimately acquitted of the charge and found to have been acting lawfully to defend himself.¹ However, I can't help but wonder if he would be sitting in prison right now had the officer's recording device not captured that part of the interrogation.

Thank you for taking the time to read my comments and consider the above rule changes. These changes are not being proposed to make law enforcement more difficult. Rather, they are being proposed to make our criminal justice system more accurate and, therefore, more successful.

Sincerely,



Zachary C. Wagnild

¹ The State of Washington was also ordered to pay his legal fees.