



April 23, 2019

The Honorable Justice Charles W. Johnson
Supreme Court Rules Committee Chair
c/o Clerk of the 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/CrRLJ 3.7, 3.8, 3.9, 4.7, and 4.11

Dear Justice Johnson and Members of the Rules Committee:

The Washington Defender Association (WDA) is writing to express our strong endorsement of the proposed rule changes to CrR 3.7, 3.8, 3.9, 4.7, and 4.11/CrRLJ 3.7, 3.8, 3.9, 4.7, and 4.11. WDA is a non-profit association of over a 1600 public defenders, criminal defense attorneys, investigators, and social workers throughout the state of Washington. WDA and its members are committed to supporting and improving indigent defense and the lives of indigent defendants and their families. A primary purpose of WDA is to improve the administration of justice and stimulate efforts to remedy inadequacies in substantive and procedural law that contribute to injustice.

CrR/CrRLJ 3.7 RECORDING INTERROGATIONS: In a time in which virtually all law enforcement officers are equipped with department-issued phones with recording capability the recording of interrogations is a direct and cost effective means of enhancing the reliability of evidence and promoting integrity in our court system. Annually, countless hours of court time are spent in litigation for which a core area of dispute is over what was or was not said during the course of an interrogation.

Even the opponents of this rule cite recordings of interrogations as a “best practice” acknowledging the value of an “actual recording where a suspect cannot claim to have been misquoted or misunderstood.” Enactment of the rule is not an “insult” to law enforcement; however, it does provide that, rather than the countless swearing contests over what was or not said during an interrogation where the imprimatur of a law enforcement of approval is all too likely to carry the day, finders of fact will have the actual facts before them. Having a full record of interrogations protects fairness, reduces the number of wrongful convictions, and ultimately promotes judicial economy.

CrR/CrRLJ 3.8 RECORDING EYEWITNESS IDENTIFICATION PROCEDURE: This proposed rule simply identifies what are universally recognized as an accurate summary of best practices with regard to eyewitness identification procedures. Flawed eyewitness identification procedures have been demonstrated time and again to be a leading factor of wrongful convictions. Court rules such as this proposal promote reliable investigation practices and expose poor ones, enhancing our justice system.

CrR/CrRLJ 3.9 IN-COURT EYEWITNESS IDENTIFICATION: First time in-court identifications of a defendant sitting at counsel table at trial are an inherently suggestive and unduly prejudicial process that substantially contribute to the fact that flawed identifications are a leading cause of wrongful convictions. The proposed rule identifies the circumstances where the inherent defects of in court identifications are maximized and justly eliminates them from the fact finder’s consideration.

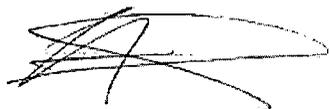
CrR/CrRLJ 4.7(a) DISCOVERY (prosecutor's obligations): The proposed rule harmonizes the court rule with the existing case law regarding the prosecutions obligations to disclose information favorable to defense. That it may increase the burden placed upon the prosecution is a function of the fact that Constitutional obligations in this regard exceed the specifics of the existing rule, which is why it needs to be amended. While there likely always will be argument over whether the rule has been complied with, the court should act to eliminate arguments based on disparity between the rule and the law.

CrR/CrRLJ 4.7(b) DISCOVERY (Defendant's Obligations): The proposed rule identifies what is to be redacted and specifies the extent or manner of redaction. The specified subjects of redaction are comprehensive and sufficient. Passage of the proposed rule will reduce litigation and delays based on disputes over what is to be redacted. Unlike the existing rule, the proposed rule establishes a specific mechanism for judicial oversight to confirm compliance when there is cause to believe redactions have not been properly made.

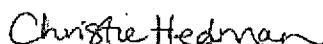
CrR/CrRLJ 4.11 – Recorded Witness Interviews: Defendants have a constitutional right to pretrial witness interviews. However, there is no requirement that an attorney may audio record or have a court reporter present at pretrial interviews over the witness' objection. Without a recorded interview the 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. Defense bar's experience is that the witnesses who most frequently decline to be recorded are law enforcement whereas civilian witnesses are more concerned that their statements not be misrepresented. 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 be recorded and the judge can determine 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.

We respectfully urge you to adopt the proposed amendments to CrR 3.7, 3.8, 3.9, 4.7, and 4.11/CrRLJ 3.7, 3.8, 3.9, 4.7, and 4.11.

Sincerely,



Harry Gasnick
Chair, WDA Court Rules Committee



Christie Hedman
Executive Director

Tracy, Mary

From: OFFICE RECEPTIONIST, CLERK
Sent: Tuesday, April 23, 2019 3:23 PM
To: Tracy, Mary
Subject: FW: Comments on Proposed Amendments to CrR 3.7, 3.8, 3.9, 4.7, and 4.11/CrRLJ 3.7, 3.8, 3.9, 4.7, and 4.11
Attachments: WDA Court Rule Comments April 2019.pdf

From: Christie Hedman [mailto:hedman@defensenet.org]
Sent: Tuesday, April 23, 2019 3:21 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Cc: Harry Gasnick <gasnickcpd@olyphen.com>; Paul Kelley <paul.kelley@co.yakima.wa.us>; Brett Hill <bhill@grantcountywa.gov>; Diane Whaley <dwhaley@ci.olympia.wa.us>
Subject: Comments on Proposed Amendments to CrR 3.7, 3.8, 3.9, 4.7, and 4.11/CrRLJ 3.7, 3.8, 3.9, 4.7, and 4.11

Dear Justice Johnson and Members of the Rules Committee,

Attached are comments from the Washington Defender Association in support of proposed amendments to CrR 3.7, 3.8, 3.9, 4.7, and 4.11/CrRLJ 3.7, 3.8, 3.9, 4.7, and 4.11.

Please let me know if you have any questions. Thank you for your consideration.

Christie Hedman
Executive Director
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