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DEPARTMENT of ASSIGNED COUNSEL

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April 29, 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

Via Email: supreme@courts.wa.gov

RE: Supporting Adoption of Proposed CrRs and CrRLJs 3.7, 3.8, 3.9, 4.11, and
Amended CrR and CrRLJ 4.7

Dear Justice Johnson and Members of the Rules Committee:

I am the director of Yakima County's public defender program. Over 90% of criminal defendants in Yakima County are deemed indigent and are served by the program. As its administrator, I see firsthand the effect court rules have on the administration of justice and its impact on the community, including the people brought before the courts on criminal actions. Because I believe that the citizens of Washington State are entitled to an efficient and effective justice system in which they are confident in the ultimate outcomes, I write in support of the adoption of proposed CrRs and CrRLJs 3.7, 3.8, 3.9, 4.11, and amended CrR and CrRLJ 4.7.

The regulation of criminal case processing is an essential duty of the courts. Periodic review of this process must include an examination of the law and practice as they evolve. The continued expectation on improving advocacy in all aspects of the practice in the criminal courts is a necessary element of this examination. The recent adoption of the Standards for Indigent Defense is an example. The courts are in a unique position to establish rules that are designed to recognize this evolution and improve the quality of the justice for the citizens of Washington State. The use of modern tools for efficient preservation of evidence seems the simplest of ideas. Why wouldn't we expect to use modern tools to improve the practice? The goal, of course, is to continue to

improve in a manner that promotes confidence that the justice system works. The new rules proposed by the Washington Association of Criminal Defense Lawyers are designed for this purpose.

CrR/CrRLJ 3.7 – Recording Interrogations (New Rule)

This proposal recognizes best practices. In a time in which virtually all law enforcement agencies are equipped with tools to preserve evidence, the recording of interrogations is a direct and cost-effective means of enhancing the reliability of that evidence and promoting integrity in our court system. Even the opponents of this proposed rule admit that the recording of interrogations is a best practice. They recognize the value of recording by admitting that a suspect cannot later claim to have been misquoted or misunderstood. Enactment of the rule recognizes the modern capability of accurately preserving interrogation evidence, evidence all practitioners recognize as vital in an overwhelming majority of criminal cases. Having a full record of interrogations protects fairness, promotes judicial economy, and improves confidence in case outcomes.

CrR/CrRLJ 3.8 – Recording Eyewitness Identification Procedure (New Rule)

This proposed rule simply identifies what is universally recognized as an accurate summary of best practices with regard to eyewitness identification procedures. Flawed eyewitness identification procedures have been demonstrated to be a leading factor of wrongful convictions. This proposed court rule promotes reliable investigation practices and exposes poor ones, enhancing our justice system.

CrR/CrRLJ 3.9 – Exclude First Time In-Court Eyewitness Identifications (New Rule)

First time in-court identifications of a defendant are inherently suggestive and unduly prejudicial. This process substantially contributes 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. This is another measure that improves our system of justice by recognizing the evolution of the law and criminal procedure.

CrR/CrRLJ 4.7(a) DISCOVERY - Prosecutor's Obligation (Proposed Amendment)

The proposed rule harmonizes the court rule with the existing caselaw regarding the prosecution's obligations to disclose information favorable to defense. While the proposal may seem to increase the burden placed upon the prosecution, the rule is consistent with constitutional obligations which exceed the specifics of the existing rule.

CrR/CrRLJ 4.7(b) DISCOVERY - Regulation of Discovery (Proposed Amendment)

This proposal provides for easier management of a continuing issue in our courts, the defendant's access to the evidence in discovery. The proposed rule specifies what is to be redacted and specifies the extent or manner of redaction. The subjects of redaction are comprehensive and sufficient. Adoption of the proposed rule will reduce litigation and delays based on disputes over what is to be redacted. There is oversight, if required. The proposed rule establishes a mechanism for judicial review to confirm compliance when there is reason to believe there are issues regarding redactions.

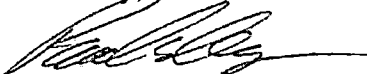
CrR/CrRLJ 4.11 – Recorded Witness Interviews (New Rule)

Effective assistance of counsel includes effective investigation and pretrial work of the lawyers representing criminal defendants in our courts. The proposed rule recognizes that efficiency results in accurate and effective preservation of the attorney's work on the client's behalf. If any of WACDL's proposed rules recognizes the effectiveness of modern tools for the practice, then it is this proposal.

Defendants in our criminal courts have a constitutional right to pretrial witness interviews as part of the investigation of their cases. While not overlooking caselaw, one only has to look as far as the WSBA's *Performance Guidelines for Criminal Defense Representation* to understand its importance. As it stands, there is no requirement that an attorney can audio record at a pretrial interview over a witness's objection. The statements and answers to questions during pretrial interviews have lasting effects on a case. Accuracy matters. The cynicism expressed by a few of the commenters opposing this rule is not helpful to its analysis.

The defense bar's experience is that the witnesses who most frequently decline to be recorded are from law enforcement. Interestingly, civilian witnesses and crime victims are more concerned about their statements not being misrepresented... by anyone. They understand the importance of accuracy. Law enforcement's objection to accurate preservation of pretrial investigations is confusing and does not assist the courts. The citizens our system serves care about the quality of the work done. This is a simple and sensible proposal. It provides a mechanism that protects the truth-finding function of the courts. I urge its adoption. Thank you for your consideration of this comment in support.

Sincerely,



Paul Kelley, Director
Yakima County DAC

Tracy, Mary

From: OFFICE RECEPTIONIST, CLERK
Sent: Monday, April 29, 2019 11:13 AM
To: Tracy, Mary
Subject: FW: Letter in Support of Proposed CrR & CrRLJ 3.7, 3.8, 3.9, 4.7 & 4.11
Attachments: Letter in Support of Proposed Criminal Rules 4-29-19.pdf

From: Paul Kelley [mailto:paul.kelley@co.yakima.wa.us]
Sent: Monday, April 29, 2019 10:44 AM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Subject: Letter in Support of Proposed CrR & CrRLJ 3.7, 3.8, 3.9, 4.7 & 4.11

Clerk of the Supreme Court,

Attached is my letter in support of proposed CrR & CrRLJ 3.7, 3.8, 3.9, 4.7 & 4.11. The letter has also been mailed. Thank you.

Paul Kelley
Director, Yakima Co. DAC
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