

Tracy, Mary

From: OFFICE RECEPTIONIST, CLERK
Sent: Monday, August 20, 2018 2:12 PM
To: Tracy, Mary
Subject: FW: Comment on proposed rules CrR 3.8 and CrRLJ 3.8
Attachments: CrR 3.8-suggested.pdf; CrRLJ 3.8-suggested.pdf

From: Terry Bloor [mailto:Terry.Bloor@co.benton.wa.us]
Sent: Monday, August 20, 2018 1:21 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Subject: Comment on proposed rules CrR 3.8 and CrRLJ 3.8

Caselaw and legislation have never required that the eyewitness identification procedure be video or audio recorded. This is very impractical for police dealing with identifications by witnesses at a show-up or a photo array given to a witness at his or her residence or place of employment.

Also, the proposed rule allows a court to declare an identification inadmissible not because the identification procedure was suggestive, but because the police did not properly document dialog between the witness and the officer, other people present at the identification procedure or people the witness talked to before, during or after the procedure. These factors could be considered by a jury in determining what weight to give the identification. But to not allow a witness or victim who has made a valid identification, free from any suggestion from the police, is unfair to the witness and unnecessary to the defendant's right to a fair trial.

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1 **SUGGESTED NEW CRIMINAL RULE CrR 3.8**

2 **CrR 3.8 RECORDING EYEWITNESS IDENTIFICATION PROCEDURE**

3 (a) **Recording.** An out-of-court identification procedure resulting from a photo
4 array, live lineup, or show-up identification procedure conducted by a law enforcement
5 officer shall not be admissible unless a record of the identification procedure is made. .

6 (b) **Documenting the Procedure.**

7 (1) All identification procedures and related interviews conducted with any
8 victim/witness should be fully documented. Video-recording should be used when
9 practicable. Audio recording is the preferred alternative. If neither video- nor audio-
10 recording is possible, administrators should produce a detailed written report of the
11 interview or identification procedure immediately following completion of the procedure.

12 (2) A confidence statement should be obtained immediately after the victim/witness
13 makes a decision. The exact words used by the victim/witness in expressing his/her degree
14 of confidence should be documented.

15 (c) **Contents.** The record of an out-of-court identification procedure is to include
16 details of what occurred at the out-of-court identification, including the following:

17 (1) The place where the identification procedure was conducted;

18 (2) The dialogue between the witness and the officer who administered the
19 procedure;

20 (3) The results of the identification procedure, including any selection, or lack of
21 selection, made by the witness/victim;

1 (4) If a live lineup, a photo of the lineup; if the identification procedure includes
2 movements, a video of the identification procedure; if the identification procedure includes
3 speaking, an audio recording of the speaking and a photo of the identification procedure;

4 (5) If a photo lineup, the photographic array, mug books or digital photographs
5 used, including an unaltered, accurate copy of the photographs used, and an accurate copy
6 upon which the witness indicated his or her selection;

7 (6) The identity of persons who witnessed the live lineup, photo lineup, or showup,
8 including the location of such witnesses and whether those witnesses could be seen by the
9 witness making the identification decision;

10 (7) The identity of any individuals with whom the witness has spoken about the
11 identification, at any time before, during, or immediately after the official identification
12 procedure, and a detailed summary of what was said. This includes the identification of
13 both law enforcement officials and private actors who are not associated with law
14 enforcement.

15 (c) Remedy: If the record that is prepared is lacking in important details as to what
16 occurred at the out-of-court identification procedure, and if it was feasible to obtain and
17 preserve those details, the court may, in its sound discretion and consistent with appropriate
18 case law, declare the identification inadmissible, redact portions of the identification
19 testimony, admit expert testimony, and/or fashion an appropriate jury instruction to be used
20 in evaluating the reliability of the identification.
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1 **SUGGESTED NEW CRIMINAL RULE CrRLJ 3.8**

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