

## Tracy, Mary

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**From:** OFFICE RECEPTIONIST, CLERK  
**Sent:** Wednesday, April 10, 2019 12:23 PM  
**To:** Tracy, Mary  
**Subject:** FW: Comment on proposed new CrR 3.8

**From:** Petersen, Jennifer [mailto:Jennifer.Petersen@kingcounty.gov]  
**Sent:** Wednesday, April 10, 2019 12:21 PM  
**To:** OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>  
**Subject:** Comment on proposed new CrR 3.8

- Proposed CrR 3.8 will impede effective law enforcement, because many individuals are reluctant to be recorded. With respect to DV victims, human trafficking victims, and any victim of a violent crime or gang-related violence, they will fear retaliation because they will anticipate (accurately) that their assailant will have access to the recording and their image may be circulated to associates of the defendant for purposes of retaliation.
- The rule will result in intimidation of victims (and witnesses) of violent crimes when recordings of them making an identification are circulated by the defendant. The recordings will be available under the Public Records Act upon the filing of charges.
- How does it further justice to bar evidence of identification procedures rather than allow the jury to determine the weight of the evidence, which is tested by cross-examination?
- The rule is impractical – most police agencies in Washington lack the resources to record and preserve all identification procedures. The rule would encompass identifications at the scene of traffic accidents as well as ongoing violent crimes.
- Existing constitutional and common law standards adequately address the issue of admissibility of identification procedures.
- **It is unclear that the lack of availability of recording devices would be a legitimate reason not to video record the procedure.** Such an exception must be included.
- **The rule does not make clear that a witness's assertion of their right not to be recorded (under the Privacy Act) would establish that recording was not possible.**
- The rule does not define “when practicable.” Who makes that decision?
- What does the reference to “administrators” mean? Supervisors?
- What “is possible” is a standard that is impossible to interpret. Does it allow an exception for exigent circumstances, lack of equipment, or community safety?
- The term “exact words” is unreasonably vague. How many words must be documented? What if the procedure is not recorded and the witness provides a lengthy explanation of the choice? What if the person is a non-English speaker – must the non-English words be documented?
- Should it not also require documentation of the relevant context of the words used, including the demeanor of the suspect and the witness?
- (c)(4) “If the identification procedure includes speaking” would appear to mandate audio recording of all procedures, since the witness always will be given verbal directions. This may be intended to refer to the subjects of the procedure speaking for purposes of voice identification, and if so, it should say that.

- (c)(6) It is an unreasonable burden to have to document the identity of all persons who witness every procedure, especially as to a showup at or near a crime scene, where the people present are fluctuating, or individuals present may not be willing to identify themselves.
- (c)(6) It is unreasonable to require documentation of whether each person who witnesses the procedure can be seen by the witness. The scene is fluctuating, and officers can't know who the witness is able to see. Forcing the witness to look around to identify who they can see is watching will be intimidating to a frightened witness.
- (c)(7) It is an impossible burden to require law enforcement to document any private persons with whom the witness has discussed the suspect's identity before the identification procedure, which could occur days, weeks or years after the crime. How would law enforcement know? What if the witness doesn't recall, or doesn't want to identify everyone who he/she has spoken to, or lies?
- Although section (b)(1) of this rule provides for an exception to the recording requirement based on impossibility, this section must include the same exception in order for the exception to have effect.
- **The remedies listed in CrR 3.8(d) are extreme and unreasonable.** For example, it would allow testimony of a defense expert witness on unspecified subjects, apparently regardless of compliance with applicable rules of evidence, if not every detail of the procedure and circumstances was recorded.
- **The term "important details" is not defined and the rule does not specify who determines whether it was "feasible" to obtain or preserve those details.** It is the jury's responsibility to determine the weight of the evidence based on the information that is available and any gaps in that evidence. Further, the lack of certainty in this standard will result in inadequate guidance for law enforcement and massive litigation.
- **The rule invites a court to craft a jury instruction "to be used in evaluating the reliability of the identification," which invites a comment on the evidence without giving any real direction to the trial court.** Judicial comments on the evidence are unconstitutional in Washington.
- The concept of redacting portions of identification testimony makes no sense. It provides no guidance to a trial court. Does it mean the jury will be deprived of information relevant to its determination?
- The phrase "consistent with appropriate case law" is without a context and its meaning is entirely unclear. There is no case law interpreting this rule. Is it intended to limit or expand the rule or remedies?

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