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The Law Office of Marla Zink, PLLC

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April 30, 2019

The Supreme Court Rules Committee  
c/o Clerk of the Supreme Court  
P.O. Box 40929  
Olympia, WA 98504-0929  
Submitted via email to: [supreme@courts.wa.gov](mailto:supreme@courts.wa.gov)

Re: Comments to Proposed Criminal Rule Amendments and New Rules

Dear Members of the Court:

I write in support of the proposed amendments to CrR 4.7 and proposed new rules CrR 3.8 and CrR 3.9. My comments apply equally to the corresponding proposals for courts of limited jurisdiction.

I have been practicing appellate criminal defense for nearly a decade. During this time, I have seen firsthand the problems that arise when identifications are not recorded and the surrounding details fully disclosed: the parties and the courts (both trial and appellate courts) often do not and cannot know what actually occurred during the identification procedure and witnesses' subsequent recall cannot be tested or verified.

These rules standardize and codify procedures to ensure more reliable witness identification processes and evidence. The rules are essential because, as this Court has recognized, eyewitness misidentification is the leading cause of wrongful convictions. *State v. Riofta*, 166 Wn.2d 358, 371, 209 P.3d 467 (2009) ("mistaken eyewitness identification is a leading cause of wrongful conviction"); accord *United States v. Wade*, 388 U.S. 218, 228 (1967) (the "vagaries of eyewitness identification are well-known" and the "annals of criminal law are rife with instances of mistaken identification"). Witness misidentification is a factor in 69 percent of post-conviction DNA exoneration cases. The Innocence Project, <https://www.innocenceproject.org/dna-exonerations-in-the-united-states/> (April 29, 2019).

In the case of misidentifications, witnesses often genuinely believe their misidentification is accurate. Memories are fallible and malleable. Implicit biases affect our memories and our recall. Thus, the unreliable evidence does not necessarily derive from nefarious conduct or relate to distrust of particular actors. But regardless of the cause, the effect is the same. Juries find identification evidence particularly compelling, despite its frequent inaccuracy. *E.g.*, *Watkins v. Sowders*, 449 U.S. 341, 352 (1981); *State v. Henderson*, 208 N.J. 208, 236-37, 27 A.3d 872 (2011).

The proposed amendments and new rules make necessary changes to foster more reliable witness identifications. The National Academy of Science recently recognized the need for better identification processes. National Academy of Sciences, *Identifying the Culprit: Assessing Eyewitness Identification* (2014), <https://www.nap.edu/read/18891/chapter/1> ("NAS Report"). The Washington Association of Prosecuting Attorney's provides this NAS Report as a manual for prosecutors. "Manuals," Washington Association of Prosecuting Attorneys, <http://70.89.120.146/wapa/manuals.html> (April 29, 2019).

Proposed new rule CrR 3.8 is consistent with the NAS Report's recommendation that identification procedures should be recorded. NAS Report at 108-09. Recording identification procedures will allow all parties, the court, and juries to learn and evaluate all the circumstances surrounding identifications.

Likewise, proposed new rule CrR 3.9 is consistent with the NAS Report's recommendation that in-court identifications should be permitted only if the witness previously identified the defendant out of court. *Id.* at 110-11. First in time in-court identifications are inherently unreliable. *E.g.*, *State v. Dickson*, 322 Conn. 410, 423-24, 141 A.3d 810 (2016) (there could hardly be a more "suggestive identification procedure than placing a witness on the stand in open court, confronting the witness with the person who the state has accused of committing the crime, and then asking the witness if he can identify the person who committed the crime"); Wells & Quinlivan, *Suggestive Eyewitness Identification Procedures and the Supreme Court's Reliability Test in Light of Eyewitness Science: 30 Years Later* 30, 33 *Law Hum. Behav.* 1, 7 (2009). In-court

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identifications do not test a witness's memory because there are no fillers; there is only one suspect. *Dickson*, 322 Conn. at 423-35.

Recording identification procedures, disclosing materials related to identifications, and limiting in-court identifications to circumstances where there was a prior identification will increase the reliability of evidence put before juries in Washington. I encourage the court to adopt these proposed rules.

Thank you for considering these comments.

Sincerely,

A handwritten signature in black ink, appearing to read 'MLZ' with a stylized flourish at the end.

Marla L. Zink  
marla@marlazink.com

**Tracy, Mary**

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**From:** OFFICE RECEPTIONIST, CLERK  
**Sent:** Tuesday, April 30, 2019 8:06 AM  
**To:** Tracy, Mary  
**Subject:** FW: Comments to proposed Criminal Rules 3.8, 3.9 and 4.7  
**Attachments:** Ltr to Supreme Court Rules Committee 4.30.2019 M Zink.pdf

**From:** Marla Zink [mailto:marla@marlazink.com]  
**Sent:** Tuesday, April 30, 2019 7:59 AM  
**To:** OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>  
**Subject:** Comments to proposed Criminal Rules 3.8, 3.9 and 4.7

Good morning,

Attached is a letter commenting upon proposed new rules CrR 3.8 and 3.9 and amendments to CrR 4.7.

Thank you,

Marla Zink  
The Law Office of Marla Zink, PLLC  
360-726-3130  
[marla@marlazink.com](mailto:marla@marlazink.com)  
[www.marlazink.com](http://www.marlazink.com)