

Tracy, Mary

From: OFFICE RECEPTIONIST, CLERK
Sent: Tuesday, March 19, 2019 11:18 AM
To: Tracy, Mary
Subject: FW: comments

From: F. Jardine [mailto:f.jardine@jardinelawfirm.com]
Sent: Tuesday, March 19, 2019 11:10 AM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Subject: comments

CrR 4.7 and CrRLJ Discovery I support the proposed amendment to the rules.

The purposes of these amendments are (1) to create CrR 4.7(a)(2)(iv), requiring the prosecuting attorney to provide all eyewitness identification procedures to the defense; (2) amend CrR 4.7(a)(3) and (4) to bring the rule into accord with *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), and its progeny; and (3) to amend CrR 4.7(h)(3) to permit defense counsel to provide properly redacted discovery to defendants.

As defense counsel I have experienced eyewitness mis-identification and had the procedures been disclosed the State may have had time to correct the defective identification.

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Sincerely,



F. McNamara Jardine, Attorney
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NEW MAILING ADDRESS
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Tracy, Mary

From: OFFICE RECEPTIONIST, CLERK
Sent: Tuesday, March 19, 2019 12:12 PM
To: Tracy, Mary
Subject: FW: Additional comments
Attachments: COMMENTS.pdf

From: F. Jardine [mailto:f.jardine@jardinelawfirm.com]
Sent: Tuesday, March 19, 2019 12:06 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Subject: Additional comments

Please see attachment for comments

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Sincerely,



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To: Supreme Court
From: F. McNamara Jardine
Re: Comments on Proposed Rule Amendments

Superior Court Criminal Rules(CrR)

- CrR 4.7 - Discovery

Criminal Rules for Courts of Limited Jurisdiction(CrRLJ)

- CrRLJ 4.7 - Discovery

Superior Court Criminal Rules(CrR)

- CrR 3.7 - Recording Interrogations
- CrR 3.8 - Recording Eyewitness Identification Procedure
- CrR 3.9 - In-Court Eyewitness Identification
- CrR 4.11 - Recording Witness Interviews

Criminal Rules for Courts of Limited Jurisdiction(CrRLJ)

- CrRLJ 3.7 - Recording Interrogations
- CrRLJ 3.8 - Recording Eyewitness Identification Procedure
- CrRLJ 3.9 - In-Court Eyewitness Identification
- CrRLJ 4.11 - Recording Witness Interviews

Please consider my comments concerning the proposed amendments to the Superior Court Criminal Rules and District Court Rules regarding discovery and pretrial proceedings. These comments will be directed towards Superior Court Rules only and any comments concerning Superior Court Rules should also be interpreted as comments relating to the corresponding District Court Rules.

Proposed Rule CrR 3.7 - Recording Interrogations. It is interesting how the significant majority of the comments regarding the proposed changes have been from prosecuting attorneys regarding the proposed amendments. Government workers as full-time employees can take the time to comment while working at the expense of the taxpayers, while private practitioners are unpaid using their own time outside of the workweek to commit to follow-through with rule amendment comments.

The concept that Miranda warnings are adequate because the police are already overburdened and overworked, and everyone should just trust that police will honorably perform their duties, is misplaced. Police choose the words they utter before a jury and/or a factfinder concerning interrogations made of individuals accused of a crime. Rather than hear the actual words spoken in a recording, police officers often times paraphrase and/or pick and choose from notes they take what words and thoughts to attribute to a person being interrogated. In this respect, it is a common practice among police officers in my jurisdiction to take what I believe to be incomplete and often incorrect notes on a notepad during an interview with a person being

interrogated. They are often scribbles or cryptic notes. The officers will then sometimes hours, or days later, prepare a police report in which they use these notes as a reference for what they believe was said by this particular individual. Often times they will use these notes as reminders of their own individual recollection of what was said. While I am sure many of these law enforcement officers attempt to take accurate notes and prepare accurate reports, often times words or statements are left out of these reports, and there is no way to crosscheck the veracity of the statements by the officer. However, human error is unavoidable. In this jurisdiction, once the report is prepared, police officers routinely, almost without exception, destroy their handwritten notes and we have no way of ascertaining exactly what they used to prepare their reports.

In my experience, police officers prepare a report, and then on their own independently recall statements that were attributed to that were not contained in any reports, or notes that have long since been destroyed. A recording of the interrogation would provide clarity and accuracy.

A recording of the having actual words of an accused person ensures clarity and accuracy for the accused and transparency of the government – which is often challenged in trials. Requiring recordings places minimal burden on law enforcement, while improving the confidence in the justice system to ensure that statements made are accurately and fairly recorded and place the words in context.

Proposed Rule CrR 3.8 - Recording Eyewitness Identification Procedure. The remarks set forth above concerning proposed CrR 3.7 apply in this instance as well.

It is difficult to imagine why prosecutors object to an accurate and documented record made of identification procedures. Mitigating the concern regarding the unreliability of out of court identifications would be not only warranted, but desirable.

Recent advancements in social science and law have shown the unreliability of out of court identification procedures. Just this week the NY Times ran an article on cross racial mis-identification. <https://www.nytimes.com/2019/03/18/nyregion/cross-race-identification-witness.html?fbclid=IwAR2cn6LDJ8jm2f9W4-W0F1wayBDwM-pzdHKsoycL6ObHsRoZXj460PPaoYE>

Proposed Rule CrR 3.9 - In Court Eyewitness Identification. As with the previous proposed Rule changes, this proposed Rule would enhance the reliability of in court identifications by excluding those that are not based on reliable and properly documented out of court identifications. The fact that someone is sitting next to counsel, particularly an individual of color, enhances the prospect of misidentification when there has been no prior reliable out of court identification conducted. It is about as suggestive as it can be. Prosecutors, I hope would support a more reliable in court identification procedure predicated on a reliable out of court identification. I recall when I was a young lawyer on a case where I represented an African American male in an assault & robbery.

The detective selected six photos for a montage. My client's photo was among the six photos. Out of court he selected the photo of the only individual with a very dark complexion-my client. The other five photos were of individuals with much lighter complexions. When the alleged victim was provided six photos all of whom possessed very dark complexions, he was unable to commit to only one photo as the man who committed the assault and robbery.

I moved to have the court exclude any in court identification because the individual was unable to identify my client from the montage. The court denied the in court identification because the out-of-court identification was so unduly prejudicial that there could be no cure.

Proposed Rule CrR 4.7 - Suggested Amendment Discovery. These changes are much needed in criminal procedure. Transparency should be the way of all government entities. It is a practical amendment that one would expect prosecutors to support. Turning over all notes relating to identification procedures whether they resulted in identification or not, or materials which would tend to impeach a State's witness supports the appearance of fairness doctrine and access to justice. The legal profession touts phrases such as criminal justice, fundamental fairness, appearance of fairness doctrine and access to justice, and administration of justice. These changes can support re-building confidence in the system. The American Bar Association raises the issue of confidence in the justice system.

http://www.abajournal.com/news/article/how_lawyers_and_judges_can_help_rebuild_public_trust_and_confidence

The proposed changes are simply following the directives of *Brady v. Maryland*, which specifically outlines particular obligations with which the State needs to comply. Allowing the defense attorney to provide a copy of reports directly to the defendant without presenting the same to the prosecuting attorney or the court only makes sense. The present Rule is unduly burdensome and often times delays the producing of. Allowing an accused to review the materials outside of the attorney's office and custody, when properly redacted, assures that the accused truly does know what evidence there is against

As officers of the court, defense attorneys would be required to comply with the redaction provisions. I have struggled for many months to wait for a deputy prosecuting attorney to approve proposed redactions. Defense counsel are guided by rules of professional responsibility to comply with the rules. The present process is slow and cumbersome, whether intentionally or inadvertently, is used by the prosecution as a means to delay the defense case preparation. Simple reports sometimes a few pages long need to have redactions made, and are sent to a prosecutor who reviews them whenever he/she feels like it, and then he/she may or may not approve. Assuming the prosecutor approves, the materials can then be supplied to the defendant. The other option is to approach the court to allow provision of copies to the accused.

Proposed Rule CrR4.11 - Recording Witness Interviews. Many of the comments by prosecutors are that the proposed Rule change requiring the recording of witness interviews is a setback for "victims," and that it violates the Privacy Act. This opposition interferes with an accused's case investigation and preparation. Witnesses, sometimes law enforcement officers, will refuse to be tape recorded. This type of obstructionist behavior, whatever it is based upon, does little to aid in the administration of justice in a fair and impartial manner.