Tracy, Mary

From: OFFICE RECEPTIONIST, CLERK
Sent: Monday, April 22, 2019 8:03 AM
To: Tracy, Mary
Subject: FW: Comment re proposed changes to CrRLJ 3.8

From: Guthrie, Stephanie [mailto:Stephanie.Guthrie@kingcounty.gov]
Sent: Sunday, April 21, 2019 11:23 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Subject: Comment re proposed changes to CrRLJ 3.8

I am writing to express my concern with many of the propose changes to the criminal rules. I neglected to include CrRLJ 3.8 in my comments about CrR 3.8. However, the same concerns apply that I set out regarding CrR 3.8:

I find proposed CrR 3.8 extremely concerning because the fact finder is the sole judge of credibility. Proposed CrR 3.7 and 3.8 propose something extraordinary: the suppression of constitutionally valid evidence that a jury may still find credible. CrR 3.7 and 3.8 presuppose that police lack credibility and therefore having an officer say what a defendant said (3.7) or say that a witness identified someone (3.8) are so inherently unreliable that they should be inadmissible, unless there is video proof. In essence CrR 3.7 and 3.8 say that police, because they are police, cannot satisfy hearsay exceptions (party opponent, statement of identification). This undermines the fundamental nature of our fact finding system: allowing the jury to determine credibility.

More specific concerns are as follows:

CrR 3.8 RECORDING EYEWITNESS IDENTIFICATION PROCEDURE

(a) Out-of-court i.d. procedure resulting from a photo array, live lineup, or show-up by law enforcement shall not be admissible unless a record of the i.d. procedure is made. Video is directed; video or audio recording is required if possible.

- 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.

(b) **Documenting the procedure**.

(1) All identification procedures and related interviews with any V/W should be fully documented. Video-recording when practicable, audio recording is the preferred alternative. If neither video- nor audio-recording is possible, administrators should produce a detailed written report of the interview or identification procedure immediately following completion.

- **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?

(2) A confidence statement should be obtained immediately after V/W makes a decision. Exact words used should be documented.

- 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) **Contents.** Record to include details of what occurred, including: (1) place; (2) dialogue between W & officer who administered; (3) results; (4) if live lineup, photo of lineup; if procedure includes movements, video; if procedure includes speaking, audio recording of the speaking and a photo of the i.d. procedure; (5) if photo lineup, the photo array, mug books or digital photos used, including an unaltered, accurate copy of the photos used, and an accurate copy upon which W indicated his or her selection; (6) identity of persons who witnessed the live lineup, photo lineup, or showup, including location of Ws and whether Ws could be seen by W making i.d.; (7) Identity of any individuals with whom the W has spoken about the i.d., at any time before, during, or immediately after the official i.d. procedure, & a detailed summary of what was said, including identification of law enforcement and private actors.

- (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.

(d) **Remedy**[numbered (c) in rule]: If the record prepared is lacking important details as to what occurred, and it was feasible to obtain and preserve those details, the court may, in its sound discretion and consistent with appropriate case law, declare the identification inadmissible, redact portions of identification testimony, admit expert testimony, and/or fashion an appropriate jury instruction to be used in evaluating the reliability of the i.d..

- **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?

Please reject the proposed changes.

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