Snohomish County
Prosecuting Attorney
Mark K. Roe

Criminal Division
Joan T. Cavagnaro, Chief Deputy
Mission Building, MS 504
3000 Rockefeller Ave.
Everett, WA 98201-4060
(425) 388-3333
Fax (425) 388-3572

April 26, 2011

Hon. Ronald T. Carpenter, Clerk
Supreme Court of Washington
P.O. Box 20929
Olympia, WA 98504-0929

Re: Proposed Amendment to RPC 3.8

Dear Mr. Carpenter,

I am writing to comment on the proposed rule dealing with a prosecutor's duties when he or she becomes aware of evidence establishing innocence.

I have great familiarity with the practical problems raised by this proposed rule. For almost 28 years, I have headed the Criminal Appellate Unit of the Snohomish County Prosecutor's Office. Among other duties, this unit is responsible for responding to post-conviction challenges to criminal convictions. As a former Chair of the WSBA Disciplinary Board, I am also familiar with the attorney discipline system.

Claims of innocence are commonplace. They are often advanced with great vehemence. This proposed rule gives another litigation tool to an already litigious group of convicted persons. If the rule is adopted, it is likely that unsuccessful claims of innocence will routinely be followed by grievances against the deputy prosecutors who opposed them. It is therefore necessary that the rule define precisely the prosecutors' duties. This proposal does not achieve that goal. Rather, it contains several areas of serious ambiguity:

1. The rule places obligations on "a prosecutor" when "the conviction was obtained in the prosecutor's jurisdiction." Who is "the prosecutor?" This is a particularly difficult question in offices that rotate deputy prosecutors among different functions. Does the obligation fall on the elected Prosecutor? Does it fall on the deputy prosecutor who originally prosecuted the case (and may be working on completely different kinds of cases when the defendant's claim of innocence is received)? Does it fall on deputy prosecutors who happen to be assigned to an appellate unit at the time? If so, which member of that unit?

Administration
Robert G. Lenz, Operations Manager
Robert J. Drewel Bldg., 7th Floor
(425) 388-3772
Fax (425) 388-7172

Civil Division
Jason Cummings, Chief Deputy
Robert J. Drewel Bldg., 8th Floor
(425) 388-6330
Fax (425) 388-6333

Family Support Division
Robert J. Drewel Bldg., 6th Floor
(425) 388-7280
Fax (425) 388-7295

2. What are "reasonable efforts to inquire into the matter?" This office, like most other prosecutors' offices in Washington, has no investigative employees. We rely on law enforcement agencies to carry out investigations. Must the prosecutor nonetheless undertake a personal investigation? How much can he or she delay action on other cases to accomplish this? How does a prosecutor "cause" an independent law enforcement agency to conduct an investigation? Is a request sufficient, or is some degree of "nagging" required?

The proposed rule makes no distinctions between recent convictions and older ones, between offenders who are serving sentences and those who have been released, or between serious and less serious crimes. It thus raises significant questions about allocation of limited public resources. How much should investigations of recent crimes be delayed in order to determine (for example) whether a defendant was mistakenly convicted of DUI 10 years before? (This is not a hypothetical example – this office has responded to such claims).

3. In what ways should a prosecutor "seek to remedy the conviction?" The Legislature has not chosen to open Washington courts automatically to claims of innocence. Rather, it has imposed a time limit on such claims whenever the defendant fails to act with reasonable diligence in discovering the evidence and filing an appropriate legal pleading. RCW 10.73.100(1). Would a prosecutor be subject to professional discipline for asserting valid procedural objections?

If the defendant has not initiated a proceeding, there are even larger problems. Many defendants who are innocent of one crime are guilty of related crimes – often more serious ones. The Double Jeopardy Clause and related statutes and rules recognize defendants' strong interests in *maintaining* their convictions. For this reason, prosecutors are almost always precluded from initiating post-conviction challenges. See State v. Hall, 162 Wn.2d 901, 177 P.2d 680 (2008). The proposed rule thus requires prosecutors to "seek to remedy" something that they have no power to remedy.

It might be suggested that this dilemma could be solved by seeking to have counsel appointed for the convicted person. This "solution" is not available. The Legislature has not authorized appointment of counsel to prepare post-conviction challenges in non-capital cases. There is no exception for claims of innocence. RCW 10.73.150(4). Thus, if the defendant has not filed a petition, it is hard to see what a prosecutor can do beyond notifying the defendant and the court – which are not sufficient steps under the proposed rule.

The "safe harbor" provision of the proposal does nothing to solve these problems. It only applies to the prosecutor's judgment concerning the sufficiency of the evidence to establish innocence. It says nothing about *who* must make this decision. Nor does it shed any light on what the prosecutor's obligations are when evidence of innocence exists.

These provisions may give rise to unintended consequences. The proposed rule may make it more risky for a prosecutor to take action on a claim of innocence than to do nothing. If the prosecutor does nothing, he or she can claim that the evidence appeared insufficient to warrant action – thus bringing the case within the "safe harbor"

provision. On the other hand, if the prosecutor takes action, it becomes difficult to claim no action was warranted. The prosecutor then becomes subject to discipline if, in hindsight, his or her actions are not considered "reasonable."

Appellate prosecutors already have heavy responsibilities. In addition to dealing with current appeals, they respond to a large number of post-conviction challenges. Many of these are rambling, untimely, and difficult to understand. The proposed rule imposes additional duties that are vague and possibly onerous. It hands new litigation weapons to a highly litigious group of individuals. The rule should not be adopted.

Very truly yours,

Seth A. Fine

SETH A. FINE
Asst. Chief Criminal Deputy