SCHOOL OF LAW
UNIVERSITY of WASHINGTON
Innocence Project Northwest Clinic

April 21, 2011

Camilla Faulk, Supreme Court Clerk
Washington State Supreme Court
P.O. Box 40929
Olympia, WA 98504-0929

RE: Suggested Amendments to RPC 3.8

Dear Ms. Faulk,

Thank you for considering our letter in support of the proposed amendments to Washington RPC 3.8. The Innocence Project Northwest Clinic (IPNW) works exclusively on post-conviction claims of actual innocence in Washington State. Since 1997, when the IPNW was formed as a volunteer organization, students and attorneys have obtained the reversal of 15 convictions. In four of these cases, our clients were fully exonerated after serving a combined total of 48 years in prison for crimes they did not commit.

Hundreds of cases of wrongful conviction have been documented in recent decades, providing practitioners and social science researchers an unprecedented opportunity to evaluate the effectiveness of our system of criminal justice. Among other things, the cases demonstrate an uncomfortable truth: that a constitutionally sound and procedurally fair trial is not always sufficient to prevent the conviction and incarceration of an entirely innocent person. The proposed amendments to RPC 3.8 acknowledge that prosecutors, as ministers of justice, are best suited to provide a post-conviction safeguard to ensure justice has been served in individual cases, and that the integrity of the criminal justice system is upheld.

As early as 1912, scholarly research has recounted cases of wrongful conviction and their causes in the United States[1]. Nearly a century later, the 268 DNA exonerations nationwide have reaffirmed the findings of the original research: that mistaken eyewitness identification, over-reliance on uncorroborated informant testimony, and poor or unethical lawyering are leading causes of wrongful convictions. The false but enduring belief that our system is infallible hinders efforts to increase its reliability.

Post-conviction claims of actual innocence generally require many years to resolve, and involve a multitude of diverse issues. Innocence work is distinguished from classic criminal appellate work in that evidence of innocence is often found outside the record, and limited options are available to counsel to present such evidence in the post-conviction arena. Many factors operate against resolution of these claims, including the passage of time, the erosion of memory and other kinds of evidence, and various procedural hurdles.

[1] S. Rep. No. 974 to Accompany the Bill S. 7675, 62d Cong. 3d Session (1912). *See also*: Edwin Borchard, Convicting the Innocent: Sixty-Five Actual Errors of Criminal Justice (1932).

The investigation and resolution of claims of actual innocence are deeply affected by the philosophical disposition of the prosecuting attorneys involved. In the post-conviction context, where individuals charged with non-capital offenses no longer have the right to counsel, affirmative efforts to bring to light evidence of innocence by the prosecuting attorney may be the only opportunity for justice to be achieved. A prosecuting attorney who is open to the possibility that a mistake was made will handle a petitioner's claim for post-conviction relief much differently than one who believes convictions must be zealously defended in every case and at all costs. The proposed amendments to RPC 3.8 will provide a foundation for all prosecutors to understand their basic ethical responsibilities when encountering new evidence, regardless of the political pressures at play, or the philosophical differences across counties and among individual prosecutors.

The advent of DNA technology and its wide application in the investigation of criminal cases has provided incontrovertible evidence that innocent people are sometimes convicted and punished for crimes they did not commit. In response, our justice system has begun a slow evolution to provide greater safeguards and avenues of relief to protect the innocent. Washington State's DNA testing statute, which originally vested in prosecutors the authority to approve or deny testing requests, is one of the few post-conviction tools available to identify and rectify wrongful convictions. In 2005 the statute was amended to transfer this decision-making power to the courts, a change that signaled a trend toward ensuring neutrality of decisions affecting the development of evidence. The proposed amendments to RPC 3.8 will continue this trend by establishing for prosecutors a neutral ethical duty to act on evidence of innocence.

We respect the Washington Association of Prosecuting Attorneys' advocacy and interest in preserving convictions that are products of the adversarial system. However, as ministers of justice and not merely conviction-seekers, prosecuting attorneys must acknowledge that convictions produced by the adversarial system are defensible only to the extent that both sides have access to the entire body of best evidence. When a prosecutor exercises discretion to deny a defendant access to information that is unknowable except through the prosecutor's disclosure, the defense is at an unfair disadvantage in the adversarial process, and the likelihood of a wrongful conviction increases. By disclosing new evidence and affording the defense an opportunity to decide the value of favorable new evidence, a prosecutor's ethical duties have been met and the proper functioning of the adversarial process has been promoted.

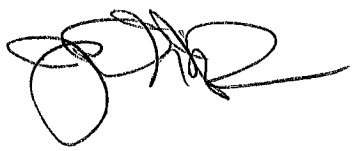
The amendments currently before the Court recognize that, as a minister of justice, the ethical responsibilities of a prosecuting attorney must not hinge on his or her subjective belief in a claimant's guilt or innocence. Indeed, adherence to traditional adversarial roles in the face of clear and convincing evidence of a defendant's innocence thwarts the truth-seeking process and does nothing to promote a just result. The proposal before the Court imposes clear disclosure requirements when a prosecutor knows of evidence of innocence and, where evidence of innocence is clear and convincing, requires a prosecutor to step out of the adversarial role and work proactively to correct the injustice.

Concerns that prosecutors will be unfairly subjected to an onslaught of complaints from individuals dissatisfied with a prosecutor's efforts to comply with the proposed amendments to RPC 3.8 are unfounded for two reasons. First, all attorneys are subject to discipline, based not on the subjective level of satisfaction achieved by the individual challenging their compliance, but based rather on an objective evaluation of compliance with their legal and ethical duties. Second, the general dearth of disciplinary action against prosecutors in Washington State and nationwide is indicative of a profound institutional reluctance to ascribe wrongdoing to prosecutors in the execution of their official duties. The recent United States Supreme Court decision in *Connick v. Thompson*[2] illustrates the wide berth our legal culture affords prosecuting agencies in performing their duties, and the refusal to hold individual prosecutors responsible for their actions - even in the face of egregious *Brady* violations.[3]

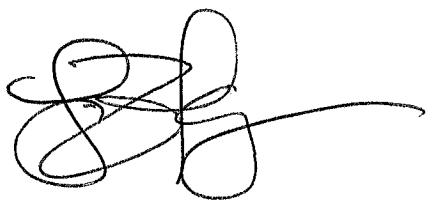
In Washington State, a single 90-day suspension was issued 11 years ago to a prosecutor for failure to disclose potentially exculpatory evidence to the defense in violation of RPC 3.8(d).[4] Given the safe harbor provision of proposed subsection RPC 3.8(i), there is no basis to conclude that the proposed amendments to RPC 3.8 will lead to disciplinary action against any prosecutor acting in good-faith to comply with his or her ethical and legal disclosure obligations.

Adoption of the proposed amendments to RPC 3.8 will facilitate the truth-seeking function of our criminal justice system by ensuring that both sides represented in the adversarial system have access to the best evidence. The amendments will reaffirm the role of prosecuting attorneys as ministers of justice, and will convey a message to the public and the legal community that real efforts to protect the innocent are of paramount significance in the state of Washington.

Sincerely,



Jacqueline McMurtrie, Associate Professor
Director, IPNW Clinic



Lara Zarowsky
Policy Staff Attorney, IPNW Clinic

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[2] *Connick v. Thompson*, 563 U.S.____ (March 29, 2011)

[3] John Thompson, *The Prosecution Rests, but I Can't*, N. Y. Times, April 10, 2011, at WK 11 (New York print edition), *also available at* http://www.nytimes.com/2011/04/10/opinion/10thompson.html?_r=1 (Attached as Appendix 1).

[4] http://www.mywsba.org/default.aspx?tabid=180&RedirectTabId=179&dID=110 (Last visited April 20, 2011)

APPENDIX 1

4/10/11 N.Y. Times 11
2011 WLNR 6920096

New York Times (NY)

April 10, 2011

Section: WK

The Prosecution Rests, but I Can't

JOHN THOMPSON

John Thompson is the director of Resurrection After Exoneration, a support group for exonerated inmates.

New Orleans

I SPENT 18 years in prison for robbery and murder, 14 of them on death row. I've been free since 2003, exonerated after evidence covered up by prosecutors surfaced just weeks before my execution date. Those prosecutors were never punished. Last month, the Supreme Court decided 5-4 to overturn a case I'd won against them and the district attorney who oversaw my case, ruling that they were not liable for the failure to turn over that evidence -- which included proof that blood at the robbery scene wasn't mine.

Because of that, prosecutors are free to do the same thing to someone else today.

I was arrested in January 1985 in New Orleans. I remember the police coming to my grandmother's house -- we all knew it was the cops because of how hard they banged on the door before kicking it in. My grandmother and my mom were there, along with my little brother and sister, my two sons -- John Jr., 4, and Dedric, 6 -- my girlfriend and me. The officers had guns drawn and were yelling. I guess they thought they were coming for a murderer. All the children were scared and crying. I was 22.

They took me to the homicide division, and played a cassette tape on which a man I knew named Kevin Freeman accused me of shooting a man. He had also been arrested as a suspect in the murder. A few weeks earlier he had sold me a ring and a gun; it turned out that the ring belonged to the victim and the gun was the murder weapon.

My picture was on the news, and a man called in to report that I looked like someone who had recently tried to rob his children. Suddenly I was accused of that crime, too. I was tried for the robbery first. My lawyers never knew there was blood evidence at the scene, and I was convicted based on the victims' identification.

After that, my lawyers thought it was best if I didn't testify at the murder trial. So I never defended myself, or got to explain that I got the ring and the gun from Kevin Freeman. And now that I officially had a history of violent crime because of the robbery conviction, the prosecutors used it to get the death penalty.

I remember the judge telling the courtroom the number of volts of electricity they would put into my body. If the first attempt didn't kill me, he said, they'd put more volts in.

On Sept. 1, 1987, I arrived on death row in the Louisiana State Penitentiary -- the infamous Angola prison. I was put in a dead man's cell. His things were still there; he had been executed only a few days before. That past summer they had executed eight men at Angola. I received my first execution date right before I arrived. I would end up knowing 12 men who were executed there.

Over the years, I was given six execution dates, but all of them were delayed until finally my appeals were exhausted. The seventh -- and last -- date was set for May 20, 1999. My lawyers had been with me for 11 years by then; they flew in from Philadelphia to give me the news. They didn't want me to hear it from the prison officials. They said it would take a miracle to avoid this execution. I told them it was fine -- I was innocent, but it was time to give up.

But then I remembered something about May 20. I had just finished reading a letter from my younger son about how he wanted to go on his senior class trip. I'd been thinking about how I could find a way to pay for it by selling my typewriter and radio. "Oh, no, hold on," I said, "that's the day before John Jr. is graduating from high school." I begged them to get it delayed; I knew it would hurt him.

To make things worse, the next day, when John Jr. was at school, his teacher read the whole class an article from the newspaper about my execution. She didn't know I was John Jr.'s dad; she was just trying to teach them a lesson about making bad choices. So he learned that his father was going to be killed from his teacher, reading the newspaper aloud. I panicked. I needed to talk to him, reassure him.

Amazingly, I got a miracle. The same day that my lawyers visited, an investigator they had hired to look through the evidence one last time found, on some forgotten microfiche, a report sent to the prosecutors on the blood type of the perpetrator of the armed robbery. It didn't match mine; the report, hidden for 15 years, had never been turned over to my lawyers. The investigator later found the names of witnesses and police reports from the murder case that hadn't been turned over either.

As a result, the armed robbery conviction was thrown out in 1999, and I was taken off death row. Then, in 2002, my murder conviction was thrown out. At a retrial the following year, the jury took only 35 minutes to acquit me.

The prosecutors involved in my two cases, from the office of the Orleans Parish district attorney, Harry Connick Sr., helped to cover up 10 separate pieces of evidence. And most of them are still able to practice law today.

Why weren't they punished for what they did? When the hidden evidence first surfaced, Mr. Connick announced that his office would hold a grand jury investigation. But once it became clear how many people had been involved, he called it off.

In 2005, I sued the prosecutors and the district attorney's office for what they did to me. The jurors heard testimony from the special prosecutor who had been assigned by Mr. Connick's office to the canceled investigation, who told them, "We should have indicted these guys, but they didn't and it was wrong." The jury awarded me $14 million in damages -- $1 million for every year on death row -- which would have been paid by the district attorney's office. That jury verdict is what the Supreme Court has just overturned.

I don't care about the money. I just want to know why the prosecutors who hid evidence, sent me to prison for something I didn't do and nearly had me killed are not in jail themselves. There were no ethics charges against them, no criminal charges, no one was fired and now, according to the Supreme Court, no one can be sued.

Worst of all, I wasn't the only person they played dirty with. Of the six men one of my prosecutors got sentenced to death, five eventually had their convictions reversed because of prosecutorial misconduct. Because we were sentenced to death, the courts had to appoint us lawyers to fight our appeals. I was lucky, and got lawyers who went to extraordinary lengths. But there are more than 4,000 people serving life without parole in Louisiana, almost none of whom have lawyers after their convictions are final. Someone needs to look at those cases to see how many others might be innocent.

If a private investigator hired by a generous law firm hadn't found the blood evidence, I'd be dead today. No doubt about it.

A crime was definitely committed in this case, but not by me.

DRAWING (DRAWING BY PADDY MOLLOY)

---- INDEX REFERENCES ---

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