Pierce County
Sheriff's Department

930 Tacoma Avenue South
Tacoma, Washington 98402

22 February 2007

Clerk of the Supreme Court
PO Box 40929
Olympia, WA. 98504-0929

RE: Proposed Rule of Court CrR 4.8

Dear Sir or Madam:

Please allow me to comment on Proposed Rule of Court CrR 4.8.

First, the decision in State v. White, 126 Wn.App. 131 (2005) was decided without regard for the history and reason behind CrR 4.8. CrR 4.8 as it currently exists was designed to provide for Subpoenas for witnesses. Just resort to the history of the rule provides an easy understanding:

Reference may be made to the Washington Proposed Rules. In those proposed rules, Rule 4.8 was presented. It was then exactly the same as it is now. The comments to the rule read as follows:

"There is no specific source for this section. The Task Force was concerned with current CrR 101.16W which governs issuance of subpoenas in criminal matters. CrR 101.16W prescribes a different and more elaborate procedure for the defendant than for the prosecution."

And, when the rule was adopted in 1973, it was accompanied by an official comment stating that the rule superceded RCW 10.46.030 and RCW 10.46.050. Those rules were discussed in State v. Edwards, 68 Wn.2d 246 (1966)(also discussing the application of CrR 101.16W). In that case, the court was dealing strictly with subpoenas for witnesses. In fact, the statutes which were superceded—especially RCW 10.46.050—dealt strictly with subpoenas directed at witnesses and not subpoenas duces tecum. It is clear that CrR 4.8 was intended to supercede statutes and rules (CrR 101.16W) which had application to subpoenas of individuals. Those rules and statutes had NO application to subpoenas for records and other material.

In short, CrR 4.8 was never intended to apply to production of records or materials. The extension in White, supra is inconsistent with the original purpose of the rule.

Second, it is not helpful to change only CrR 4.8 without regard to CrR 4.7(d). Specifically, CrR 4.7(d) provides that "the court" is to issue Subpoenas or orders to show cause.

However, the Supreme Court in State v. Blackwell, 120 Wn.2d 822 (1993) provides that the movant must make a "threshold showing of materiality" before the court will order documents provided by a third party. The proposed rule provides for no such "threshold showing" or other materiality. To the extent that Blackwell, supra, places a burden on defense counsel to put forth a threshold showing of why this material is needed, the proposed rule turns this presumption on it's head. That is, now the third party must seek affirmative action and a protective order under subpart (4) of the rule.

It is also not clear from the proposed rule if there is any requirement of materiality. That is, do the provisions of CrR 4.9(d) and Blackwell, supra continue to exist under subpart (4)(iv) that it somehow exceeds the scope of discovery otherwise permitted under the criminal rules?

Changing this rule without regard for the provisions of CrR 4.7 and in particular, CrR 4.7(d), will cause no end of mischief.

Thank you for allowing me to comment on this rule.

Yours very truly,

Craig Adams
Deputy Prosecuting Attorney and
Legal Advisor to the Sheriff