Tracy, Mary

From: OFFICE RECEPTIONIST, CLERK
Sent: Monday, April 22, 2019 8:02 AM
To: Tracy, Mary
Subject: FW: Comments re proposed rule CrR 4.7 and CrRLJ 4.7

From: Guthrie, Stephanie [mailto:Stephanie.Guthrie@kingcounty.gov]
Sent: Sunday, April 21, 2019 11:16 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Subject: Comments re proposed rule CrR 4.7 and CrRLJ 4.7

I am writing to express my concern with many of the propose changes to the criminal rules. My concerns regarding proposed changes to CrR 4.7 also apply to CrRLJ 4.7.

CrR 4.7 DISCOVERY

(a) **Prosecutor's obligations**:

(2) Shall disclose to the defendant:

(iv) [new] All records, including notes, reports, and electronic recordings re: all identification procedures, whether or not the procedure resulted in an identification or resulted in i.d. of a person other than the suspect.

(1) Shall disclose any info that tends to negate Δ's guilt as to offense charged, [new] and/or which tends to impeach a State's witness.

- This provision purports to codify the requirements of Brady v. Maryland, but that case is limited to information that is material. Without that limitation, the proposed additional obligation to disclose any information that "tends to impeach" is unreasonably burdensome and unwarranted.

(4) Prosecutor's obligation under this section ~~is limited to material and info within the knowledge, possession or control of members of the prosecuting attorney's staff.~~ includes material and evidence favorable to the defendant and material to the defendant's guilt or punishment, and/or which tends to impeach a State's witness. This **includes favorable evidence known to others acting on the State's behalf in the case,** including the police. The prosecuting authority's duty under this rule not conditioned on a defense request for such material. **Such duty is ongoing, even after plea or sentencing.**

- The proposed amendment to CrR 4.7 requires the State to disclose evidence known to anyone acting on the State's behalf, which arguably includes any State witness, especially with the concluding clause, "including the police." It could be construed to include witnesses testifying pursuant to a plea agreement. It is unreasonable to require the State to disclose evidence of which it is unaware when that evidence is known only to a witness or another civilian. While the Brady obligation extends to evidence known to law enforcement directly involved in an investigation, it certainly does not extend to civilians who are not State agents. If the proposed amendment is not intended to expand the Brady rule, then it is entirely unnecessary.

- The courts have defined what is "material" to guilt or punishment in cases applying the rule of Brady v. Maryland, but this rule does not refer to that definition and so invites courts to apply a much broader definition. There is no justification offered for applying a broader definition. If the proposed amendment is not intended to expand the Brady rule, then it is unnecessary.
- The amendment requires disclosure of all evidence that "tends to impeach" any State witness, without limiting that obligation to material evidence. There is no justification for such a radical expansion of the Brady obligation, which is limited by a materiality requirement.
- This proposed amendment completely eliminates any restriction on the obligation of the State to disclose evidence that may be known to anyone. It invites the courts to conclude that the State has the duty to collect all evidence that may be exculpatory, which is the responsibility of the defense, not the State, and is an obligation that would never be satisfied.
- The overbreadth of the State's obligation to learn of all evidence that "tends to impeach" any State witness regardless of materiality is further exacerbated by the imposition of a duty to learn of such evidence and disclose it until the end of time.
- The proposed amendment imposes an obligation on the prosecution to continue to track its (and the investigating police agency, and others acting on the State's behalf) contacts with all witnesses in every case, forever, so that if they ever act in a way which would tend to impeach their testimony, that can be disclosed.
- The proposed amendment requires ongoing disclosure after sentencing, but to whom? It implies an obligation to locate an unrepresented defendant even if the conviction is final, the sentence has been served, and the conviction may even have been vacated. This is an unreasonable burden with respect to evidence that is not materially exculpatory.
- After sentencing, RPC 3.8(g) requires a prosecutor to disclose "new, credible and material evidence creating a reasonable likelihood that a convicted defendant is innocent of the offense of which the defendant was convicted." That is a reasonable post-sentencing obligation. The much broader requirements of this proposed rule are unnecessary and impose an unreasonable burden on the State.

(h) **Regulation of discovery**.

Defense counsel may provide discovery to the defendant without a prosecutor's or court knowledge or approval. The only redactions required before providing it are: various account/ i.d. numbers; DOB redacted to the year only; names of minors redacted to initials; home addressed redacted except for city and state.

- Under this amendment, defense counsel does not have to provide notice to the State before giving the discovery to the defendant. So, in order to protect the safety and privacy of victims and witnesses, prosecutors will have to review all discovery before providing it to the defense, to be able to move for protective orders preventing release of sensitive information to the defendant. This will delay providing discovery to the defense in most cases, and increase the workload of all parties and the courts as the requests for protective orders are litigated.
- The list of necessary redactions is obviously insufficient. Redactions that currently are required by prosecutors as a general rule also include the following: all contact information for all potential witnesses, including email; schools attended by witnesses; job locations and employers of witnesses; medical records; mental health and counseling records; CPS records; photos or video (including on a digital device, or in an electronic file) with images of any part of any person or animal; and any description or depictions of actual, attempted, or simulated sexual contact. Defense counsel is always permitted to review these items with the defendant but it is obvious that putting copies of this material (including autopsy photos, photos of injured victims, and sexually explicit images) in the hands of the defendant would endanger witnesses or unnecessarily invade their privacy for the prurient interest of the defendant or anyone with whom he shared the material.
- It has been the experience of prosecutors that defense counsel often do not properly redact discovery that they have submitted to the prosecutor for approval before providing it to the

defendant, pursuant to the current rule. It poses unnecessary risks to the safety and privacy of victims and witnesses to eliminate this second set of eyes reviewing the redactions.

- There will be no incentive for defense counsel to carefully redact the discovery, as there is no penalty for failure to do so.
- There is no effective remedy if the defendant is provided with incompletely redacted discovery, so eliminating review by the prosecutor is contrary to the community's interest in public safety.

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