SUPERIOR COURT
OF THE
STATE OF WASHINGTON
FOR PIERCE COUNTY

GARY JOHNSON, PRESIDING JUDGE
Linda Schramm, *Judicial Assistant*
DEPARTMENT 10
(253)798-7572

334 COUNTY-CITY BUILDING
930 TACOMA AVENUE SOUTH
TACOMA, WA 98402-2108

April 15, 2019

Chief Justice Mary Fairhurst
Washington Supreme Court
Temple of Justice
Olympia, WA

Re: Proposed to CrR 4.7, CrRLJ 4.7 (Discovery); CrR 3.7, CrRLJ 3.7 (Recording Interrogation); CrR 3.8, CrRLJ 3.8 (Recording Eyewitness Identification Procedure); CrR 3.9, CrRLJ 3.9 (In Court Identification Procedures); CrR 4.11, CrRLJ 4.11 (Recording Witness Interviews).

Dear Chief Justice Fairhurst and Associate Justices,

On behalf of the Pierce County Superior Court, we write to urge caution as the Court considers proposed changes to the above-referenced criminal rules. While it may certainly be argued that some reforms are necessary, the proposed rules involve a number of challenges which may unintentionally thwart the efforts of all the stakeholders to ensure a more just system.

For instance, the proposed changes to eyewitness identification procedure do not include any requirements of "blinding," which is generally considered to be the best safeguard against tainted identifications. Double-blinding can be used to prevent a lineup administrator from either intentionally or unintentionally influencing a witness. In these cases, neither the eyewitness nor the administrator knows which persons in a photo array or live lineup are the suspected culprits and which are the fillers. In eyewitness identification procedures, as in science, the purpose of double-blinding is to prevent the conscious or subconscious expectations of the administrator from influencing the witness or research outcomes.

More specifically, the proposed changes to CrR 4.7 are unnecessary and duplicative, as they are firmly embedded in the Supreme Court's, as well as other reviewing courts' jurisprudence. See, *Brady v. Maryland*, 373 U.S. 83 (1963); *Mooney v. Holohan*, 294 U.S. 103 (1935); *Pyle v. Kansas*, 317 U.S. 213 (1942); *Giglio v. United States*, 405 U.S. 150 (1972) *Kyles v. Whitley*, 514 U.S. 419, 437, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995). *State v. Lord*, 161 Wash.2d 276, 292, 165 P.3d 1251 (2007); *State v. Mullen*, 171 Wash.2d 881, 259 P.3d 158 (2011). The proposed change to CrR 4.7, Section 4 states in part, "Such duty is ongoing, even after plea or sentencing." Such a rule is unworkable as presently phrased and runs counter to the oft-repeated concept of finality in justice. This concept appropriately serves some of the core concerns of the criminal justice system. It also seeks to upend the collateral attack process by shifting the burden to the prosecution to continue to seek out information about a case which may be years or decades old.

Finally, most, if not all the proposed rule changes significantly undermine a trial judge's discretion with respect to the authority to rule on the admissibility of evidence. Judicial discretion is an important underpinning of the criminal justice system, as well as an important aspect of judicial independence under the doctrine of separation of powers. More practically, however, judicial discretion allows for the trial judge to balance to the rights of each party in the case. Our reviewing courts have long held that most evidentiary matters are left to the sound discretion of the trial judge, who is in the best place to make such decisions. The proposed rule changes, in many respects, upset that long-held model.

While there are additional reasons to voice our specific concerns about the proposed rule changes, it seems more appropriate to suggest an alternative path. My understanding is that the Washington State Senate under SB 5714 creates a stakeholder work group to examine some of the questions raised by the proposed rule changes. It may be more helpful for the Court to create its own stakeholder group to objectively examine some of the reforms suggested by the proposed rule changes. This group might include prosecutors, defense attorneys, trial judges and perhaps civil rights advocates.

We are hopeful the Court makes a measured and cautious response to the proposed rule changes and seeks out a workgroup dedicated to drafting common-sense reforms to our criminal rules.

Michael Schwartz, Judge
Pierce County Superior Court, Department 3
Criminal Procedures Committee, Chair
Criminal Justice Committee, Chair

Garold E. Johnson, Presiding Judge
Pierce County Superior Court, Department 10

Tracy, Mary

From: Jennings, Cindy
Sent: Wednesday, May 1, 2019 1:20 PM
To: Tracy, Mary
Cc: Hinchcliffe, Shannon
Subject: FW: Letter from Judges Garold Johnson and Michael Schwartz
Attachments: Judge G. Johnson and M. Schwartz rule comments.pdf

Mary, I'm forwarding this to you since Shannon is on the road today.

Best,
Cindy

From: Phillips, Cindy
Sent: Wednesday, May 1, 2019 12:33 PM
To: Johnson, Justice Charles W. <Charles.Johnson@courts.wa.gov>; Hinchcliffe, Shannon <Shannon.Hinchcliffe@courts.wa.gov>
Cc: Jennings, Cindy <Cindy.Jennings@courts.wa.gov>
Subject: Letter from Judges Garold Johnson and Michael Schwartz

Please see the attached letter that the Chief received from Judges Johnson and Schwartz from Pierce County. For your information, the Chief will be talking to Dory regarding the judges' suggestion about participation in a stakeholder workgroup mentioned on page two. Let me know any questions or concerns. Thank you.

Cindy Phillips
Judicial Administrative Assistant to
Chief Justice Mary E. Fairhurst
Washington State Supreme Court
360-357-2054