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Washington State Supreme Court
supreme@courts.wa.gov

Re: Proposed Court Rules CrR 3.7, 3.8, 3.9, 4.7, and 4.11

Honorable Justices of the Supreme Court:

I write to urge you to adopt the proposed criminal court rules.

I have been practicing in criminal defense for eight years in this state and represent adults and children accused of serious, felony crimes in state and federal courts throughout the State of Washington. I have appeared in 23 counties and all five United States District Courts in Washington. I also serve on the Class A Felony panels in King County and Pierce County, and on the CJA panel for federal felony cases. My firm, Gause Law Offices, also specializes in representing juvenile clients throughout the state.

I contribute many hours to my community each year by serving on various committees and boards, and by providing pro bono work in excess of 100 hours per year. I am the Co-Chair on the WACDL Court Rules committee, and serve on the WACDL Board of Governors. I recently spearheaded a project to collect information around the State to create a statewide defense attorney Brady v. Maryland list. I frequently contribute articles on defense-related topics and speak at defense CLE's.

Our criminal justice system is meant to distinguish who is guilty and who is innocent. It aims to keep the community safe from crime, but also protect an accused's rights. We all want the system to be accurate. We know, however, that our system is not always accurate. Innocent people are convicted. Innocent people are charged and held in detention awaiting trial only to have their case dismissed after weeks, months, even years of confinement. Despite the best intentions of all parties, innocent people are prejudiced by our system with no recourse. The effects of these mistakes on families is heart wrenching to watch.

This system relies on human beings, with biases and mistakes and prejudices and backgrounds that color their opinions and judgments. Police officers are given an enormous amount of power and discretion on how to investigate and gather evidence. Prosecutors' charging decisions vary widely across the state. Every county has a different set of procedures for how they produce discovery to defense attorneys. It is wildly inconsistent and results in marked differences in results across the state.

Judges follow law and court rules, but without clearly defined parameters and with too much discretion, they too can interject biases and prejudices into their decision making. Judges rely on attorneys to provide information and arguments for how evidence should be admitted, how discovery should be provided, and how to interpret evolving standards and best practices for gathering information to be used at trial. And this system relies on juries, who are not aware of inherently human flaws. They rely on our justice system – the attorneys, the judge, and the law – to explain how the facts of a case may be biased, incomplete, or flawed.

Our communities, especially communities of color, have lost trust in law enforcement and in the criminal justice system as a whole. These amendments to the criminal court rules aim to restore that trust. Recent polls suggest that the majority of Americans do not feel that police are adequately held accountable for their actions, treat racial groups equally or use the right amount of force.[1] This lack of trust undermines the legitimacy of law enforcement and creates an unequal society in which some feel comforted by law enforcement while others feel suspicious and distrustful. Members of the community are more likely to feel safe and cooperate in investigations if they trust law enforcement; thus, it is in the best interest of all stakeholders to understand and build trust in law enforcement. These rules provide more oversight and guidelines for law enforcement, and most importantly *transparency* so that police procedures are fully documented.

We must strive for more accuracy in our justice system. The proposed amendments to our criminal court rules bring our justice system closer to one we can be proud of. These amendments are based on scientific knowledge, and information gathered from Innocence Project exonerations. We are continually learning how the system gets it wrong, and striving to right those wrongs. These amendments move us in the right direction.

CrR 3.7 – Requiring Interrogations to be Recorded

Recording interrogations provides clear transparency to prosecutors and defense attorneys alike. They allow both parties to assess how questions are asked and how an accused's answers are given. They clearly document that *Miranda* warnings are given prior to questions being asked. Recording can assist the prosecution in assessing an accused's credibility. They also provide defense counsel with an accurate record that can be helpful for a defendant's decision whether to testify or not. A recorded confession can help assist in early resolution of cases. All parties benefit from recording interrogations. Without recording, we are left to trust and rely on a police officer's memory of the interview, which may leave out important details. Often, it's not an officer's deliberate intent to omit certain sentences or details. It is human nature. Interrogation is already a best practice throughout Washington. Many agencies *always* audio and video record interrogations and witness interviews.

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[1] Psychology Today, What Happens When We Don't Trust Law Enforcement, Michael Friedman, Ph.D., September 2014, accessed at https://www.psychologytoday.com/us/blog/brick-brick/201409/what-happens-when-we-dont-trust-law-enforcement-0, citing to USA TODAY/Pew Research Center Poll accessed at: https://www.usatoday.com/story/news/nation/2014/08/25/usa-today-pew-poll-police-tactics-military-equipment/14561633/.

Even in counties without these technological capabilities, interrogations can easily be audio recorded with the use of a recording device. Such devices are not expensive to purchase nor are they burdensome for officers to carry.

CrR 3.8 – Recording Eyewitness Identification Procedures

There are many Washington counties already complying with this best practice by recording all eyewitness identification procedures. This includes line ups, show ups, and photo montages. The Washington Association of Prosecuting Attorneys has already endorsed this practice in it's Model Policy on Eyewitness Identification – Minimum Standards, adopted on April 16, 2015. In fact, WAPA's own *minimum standards* state that all interviews and identification procedures with victims/witnesses should be **fully documented** by video recording or audio recording when practicable. Our proposed amendment to the rule states the same.

There are many reasons recording this critical part of an investigation is important. First, it allows the attorneys, judge, and jury to analyze how the witness was admonished prior to the identification. Second, it allows the attorneys, judge and jury to see any hesitation or confusion by the witness prior to an identification. It ensures that there is no subtle suggestion by law enforcement. Accurate eyewitness identifications lead to accurate convictions. But sloppy procedures by law enforcement often lead to inaccurate identifications, wrongful convictions, and later exonerations.

We know that faulty eyewitness identification is one of the top reasons for wrongful convictions. The Innocence Project reports that, since 1989, 351 people have been exonerated of crimes they did not commit through DNA evidence. Of those 351 cases, *71 percent involved mistaken identity*.[2]

The Innocence Project explains how variables in identification procedures cause misidentifications:

"Leading social science researchers identify two main categories of variables affecting eyewitness identification: estimator variables and system variables.

> **Estimator variables** are those that *cannot be controlled* by the criminal justice system. They include simple factors like the lighting when the crime took place or the distance from which the witness saw the perpetrator. Estimator variables also include more complex factors, including race (identifications have proven to be less accurate when witnesses are identifying perpetrators of a different race), the presence of a weapon during a crime, and the degree of stress or trauma a witness experienced while seeing the perpetrator.
>
> **System variables** are those that the criminal justice system *can and should control*. They include all of the ways that law enforcement agencies retrieve and record witness memory, such as lineups, photo arrays, and other identification procedures. System variables that substantially impact the accuracy of identifications include the type of lineup used, the selection of "fillers" (or members of a lineup or photo array who are not the actual suspect), blind administration, instructions to witnesses before identification procedures, administration of lineups or photo arrays, and communication with witnesses after they make an identification.

[2] https://www.innocenceproject.org/dna-exonerations-in-the-united-states/

Several implementable procedures have been shown to significantly decrease the number of misidentifications by controlling system variables and reducing the chances of producing a biased result."[3]

The comments in opposition to this rule claim that proposed CrR 3.8 suppresses evidence that a jury may still consider credible. Not true. The rule merely codifies the best practices for eyewitness identification procedures as recognized throughout the United States, and even by our own Washington Association of Prosecuting Attorneys. Some of the comments by prosecutors throughout the state seem to indicate they are not even aware of their own association's *minimum practices* for eyewitness identification procedures. Even if an eyewitness procedure cannot be audio or video recorded, that does not necessarily require suppression of an identification. This rule allows a judge to assess the compliance with best practice procedures, and any reasons for why procedures were not followed, then decide whether to exclude or admit the identification. The results will be more reliable, accurate, and credible trials and convictions.

CrR 3.9 – In Court Eyewitness Identification

This outdated way of allowing a witness to identify the defendant in court is minimally probative and highly prejudicial. Without a documented accurate *out of court* identification, making an in-court identification of a defendant is simply too suggestive for be probative, and is grossly misleading to a jury.

Research shows that out-of-court identification procedures can irreparably taint the reliability of an in-court identification when the out-of-court identifications resulted in no identification or a misidentification of a filler. Neil v. Biggers, 409 U.S. 188, 93 S. Ct. 375, 34 L. Ed. 2d 401 (1972).

As the Connecticut Supreme Court recently found, there could hardly be a more "suggestive identification procedure than placing a witness on the stand in open court, confronting the witness with the person who the state has accused of committing the crime, and then asking the witness if he can identify the person who committed the crime." State v. Dickson, 322 Conn. 410, 423-24, 141 A.3d 810 (2016). Research also shows nonidentifications correlate with a suspect's innocence, not his guilt. Steven Clark, et al., *Regularities in Eyewitness Identification*, 32 Law & Hum. Behav. 187, 211 (2008).

For these reasons, courts should require there be a positive out-of-court identification procedure prior to any in-court identification of a defendant.

CrR 4.7(a)(2)(iv) – Requiring Prosecutors to Disclose all Records related to Identification Procedures

This proposed amendment simply adds that all records, including notes, reports, and electronic recordings relating to an identification procedure be provided to the defendant. This includes identifications made or attempted to be made.

Identifications attempted to be made that were *not* successful and/or helpful to the state's case must be disclosed anyway under Brady v. Maryland, 373 U.S. 83 (1963) ("The of evidence favorable to an accused violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."); Giglio v. United States, 405 U.S. 150 (1972) (The rule stated in Brady applies to evidence undermining witness credibility); Kyles v. Whitley, 514 U.S. 419 (1995) (The duty to disclose evidence requires a prosecutor to learn of any favorable evidence known to the others acting on the government's behalf including the police."; United States v. Agurs, 427 U.S. 97 (1976) (Duty to

[3] The Science Behind Eyewitness Identification Reform, Innocence Project, accessed at https://www.innocenceproject.org/science-behind-eyewitness-identification-reform/

disclose Brady evidence even when there has been no request by the accused); and United States v. Bagley, 473 U.S. 667, 676, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985) (Brady duty encompasses impeachment evidence as well as exculpatory evidence.)

This rule merely clarifies what the law already requires.

CrR 4.7(a)(4) – Clarifying Prosecutor's Brady Obligations

Prosecutors are already required to disclose any material or information within the prosecuting attorney's knowledge which tends to negate a defendant's guilt as to the offense charged. CrR 4.7(a)(3). However, constitutionally required obligations under Brady v. Maryland, 373 U.S. 83 (1963); Giglio v. United States, 405 U.S. 150 (1972); Kyles v. Whitley, 514 U.S. 419 (1995); United States v. Agurs, 427 U.S. 97 (1976), also require the state to disclose material and information which **tends to impeach any state witness.** United States v. Bagley, 473 U.S. 667, 676, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985) (*Brady* duty encompasses impeachment evidence as well as exculpatory evidence.) **CrR 4.7(a)(3)** should be amended to reflect both *exculpatory* and *impeachment* evidence.

In addition, as of now, CrR 4.7(a)(4) limits the state's Brady obligations to "material and information within the knowledge, possession, or control of members of the prosecuting attorney's staff." This statement is in direct conflict with controlling United States Supreme Court law. Kyles v. Whitley, 514 U.S. 419 (1995), specifically held that the scope of the duty to disclose evidence includes the individual prosecutor's duty "to learn of any favorable evidence known to the others acting on the government's behalf ... including the police." Further, due process requires disclosure of any evidence that provides grounds for the defense to attack the reliability, thoroughness, and good faith of the police investigation, to impeach the credibility of the state's witnesses, or to bolster the defense case against prosecutorial attacks.

Sadly, although prosecutors and police officers want us to just "trust" that they will comply with Brady v. Maryland, we know from case after case that we need to enforce the rules and law when it comes to requiring disclosure of exculpatory and impeachment material. This rule simply clarifies what the case law already requires. It does not attempt to stretch the case law any further than it already plainly reads.

I wrote this proposed amendment. I am passionate about the need for further education and enforcement surrounding a prosecutor's obligations under Brady v. Maryland. WACDL has been gathering information about how various prosecutor offices around the state obtain Brady information, keep Brady lists, and disseminate Brady information to defense counsel. There is no uniform approach, and results vary widely. In some counties, there are no Brady lists, and no procedures or policies governing how the state assures it complies with obligations under Brady v. Maryland and progeny.

That is scary. As a devoted criminal defense attorney, the only way we know whether there is exculpatory or impeachment evidence is if a prosecutor tells us. We rely on the state to understand its Brady obligations and comply with them.

The comments from various prosecuting attorneys highlight the need for the rule, showing that prosecutors across the state do not know the law on Brady obligations:

Senior Deputy Prosecuting Attorney Adrienne McCoy writes: "the additional discovery obligation for information that 'tends to impeach a witness' exceeds the well-settled Brady requirements and places impossible discovery obligations on prosecutors to know the unknowable." Yet, that language comes from our United States Supreme Court in United States v. Bagley, 473 U.S. 667, 676, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985) ("in the present case, the prosecutor failed to disclose evidence that the defense *might have used* to impeach the Government's witnesses by showing bias or interest. Impeachment evidence, however, as well as exculpatory evidence, falls within the Brady rule. *See* Giglio v. United States, 405 U.S. 150, 154,

92 S.Ct. 763, 766, 31 L.Ed.2d 104 (1972). Such evidence is "evidence favorable to an accused," Brady, 373 U.S., at 87, 83 S.Ct., at 1196, so that, if disclosed and used effectively, it may make the difference between conviction and acquittal.")

Even more frightening, elected prosecuting attorney of Kittitas County, Gregory Zempel writes: "(a)(4) is simply unworkable... we do not as a matter of law have such control over LE agencies – they are independent executive entities, and even in the case of a county SO, we can advise but cannot coerce." It seems Prosecutor Zempel is attempting to claim that his office has no duty to seek exculpatory or impeachment information from the investigating law enforcement agency. This is clearly inconsistent with Kyles v. Whitley. This underscores the reasons the criminal court rule is necessary.

And finally, the objection written by Deputy Prosecuting Attorney Tod Bergstrom complains about the prosecutor's obligation to find and disseminate to defense counsel "favorable evidence known to other's acting on the state's behalf, including the police including IMPEACHMENT evidence." He calls this task "impossible to fulfill." That is the State's duty under Kyles v. Whitley, 514 U.S. 419, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995) which held: "Individual prosecutor has duty to learn of any favorable evidence known to others acting on government's behalf in case, including police, in order to avoid Brady violation." How can so many prosecutors be ignorant of these requirements? Mr. Bergstrom then poses a hypothetical and asks "is the King County Prosecutor going to be required to send out a bulletin to everyone in SPD seeking information on that witness that defense counsel may find useful for impeachment?" The answer, under the law, is "yes." That is what the law requires: a duty to seek information. Prosecutors have a duty to request law enforcement provide impeachment and exculpatory information. The failure to do so may result in dismissal before trial, suppression of evidence, or reversal after conviction. Attached hereto is an order from federal judge Richard A. Jones dismissing a case of mine due to a Brady v. Maryland violation which summarizes the law on this beautifully.

The comments in opposition to the proposed amendment to CrR 4.7(a)(4) demonstrate the need for the rule.

To clarify what the law already requires, I strongly urge this court to adopt the proposed amendment to CrR 4.7(a)(4).

CrR 4.7(h)(3) – Allowing Defendants Better Access to their Discovery

This proposed amendment eliminates one step in the process for providing clients with redacted discovery. It would no longer require defense attorneys to provide proposed redacted discovery to the prosecutor for review and approval before providing that discovery to our clients.

For out-of-custody clients, it is much easier to provide access to discovery. A client may simply come to your office, and review discovery at their leisure in a conference room without your presence. They may not take a copy of the discovery, but they can review and take notes for as long as they like. This form of review may be done with *unredacted discovery*. For most of my out-of-custody clients, I do not necessarily need to go through the process of redacting discovery, obtaining prosecutor approval, and then disclosing a copy to my clients. In addition, people who are allowed to remain out of custody are often charged with less-serious crimes, and have a lower volume of discovery to review.

For in-custody clients, the majority of my caseload, the process of providing my clients access to discovery is burdensome, sluggish, and unfair. These clients, of course, are often persons of color, economically disadvantaged, charged with serious crimes with much at stake, and unable to post bail. These details make this proposed amendment to the rule one that triggers equal protection considerations.

For in-custody clients, I cannot spend the necessary time to review all of the discovery with my clients in the jail. Such a task would take hours and hours that I simply do not have. Thus, it is critical that I be able to provide my client a copy of redacted discovery.

As the rule is today, the process is as follows. Once I redact the discovery, I send it to the assigned prosecuting attorney. Often, that attorney is in trial or otherwise burdened by a heavy case load. They sometimes ask their paralegal to review redactions for them. It can take weeks, and in some cases, months for prosecutors to find the time to review the proposed redactions and indicate approval to provide discovery to my client. All the while, my client is in custody, eager to review the facts and circumstances surrounding the charge against him or her. My client's speedy trial clock is ticking. My client knows his or her case best – and must be in a position to assist me in defending the case. The weeks to months delay in providing discovery causes setbacks in investigation, in preparation for trial, and in ensuring my client may receive a speedy trial.

The argument that defendants will use a redacted copy of discovery to find and harm victims or witnesses is confusing at best. Defendants know who the victims and witnesses are. Criminal defense lawyers review that information with our clients, and share that information freely as we are required to do. In addition, defense attorneys are already able of providing an *unredacted* copy of discovery to clients to review in our presence – where all of the sensitive information is able to be seen by the client.

The proposed rule still complies with redaction policies. Redacting addresses, phone numbers, birth dates, and other sensitive information removes any concern that criminal defendants will be able to locate or find witnesses and victims on their own.

This rule simply allows defense attorneys, officers of the court, to provide redacted discovery to our clients without jumping through additional hoops of obtaining approval from over-worked prosecutors prior to doing so. It affords protections to the court and state by requiring us to keep a copy of redacted discovery so we may furnish to the court or state upon any request.

CrR 4.11 – Recording Defense Witness Interviews

Why is it that the civil court rules provide for greater protections and evidence gathering than the criminal court rules?

Most of the time, civilian witnesses and law enforcement officers agree to be tape recorded during defense witness interviews. There are, however, a number of officers who simply refuse to be recorded because they know that it will be harder to hold them accountable to what they say during the interview and decrease an accused's opportunity to impeach the officer if his or her statement changes at trial. This is an obstruction tactic that unfairly prejudices criminal defendants' right to confront and impeach witnesses against them.

Requiring defense attorneys to bring an impeachment witness to every interview, take meticulous word-for-word notes, and ensure the impeachment witness is available for trial adds another layer of unfairness for criminal defendants. It is burdensome, wastes resources, costs the county and city tax payers more money (to fund more hours for investigators' presence) and is so easily fixed by this rule.

This proposed rule applies to both parties, thereby allowing more transparency and accountability for all witness interviews, whether it is a state witness interview or a defense witness interview.

The comments in opposition to this rule scoff at the requirement to record witness interviews, claiming that a person has the right to refuse to be recorded under this state's privacy act. The rule contemplates this and

allows witnesses to refuse to be recorded. However, a jury may then be instructed about a witness's refusal to submit to a pretrial recorded interview. Such information is admissible to show any bias against the defendant and/or defense attorney, especially when a witness may be considered to be obstructing an investigation. Each inquiry will be fact-specific and our judges will be able to craft remedies specific to each case.

There is no additional cost for implementation of this rule. It requires prosecutors and defense attorneys to bring a recording device (average cost: $23.00)[4] to witness interviews to record the conversation. The result is production of a completely accurate word-for-word recording or transcript that can be used at trial.

In conclusion, I urge you to adopt these proposed criminal court rules, or enact a workgroup to consider revising and further crafting the rules.

Thank you for your consideration of my comments. I welcome any additional discussion or input on these rules.

Thank you,

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[4] Digital Voice Recorder, $23.69 on amazon.com, accessed at: https://www.amazon.com/Multifunctional-Dictaphone-Microphone-Reduction-Recording/dp/B07G14Q5MM/ref=sr_1_11_sspa?crid=3HDYWLZU06Q8Y&keywords=audio+recording+device&qid=1555615944&s=gateway&sprefix=audio+recording%2Caps%2C209&sr=8-11-spons&psc=1

HONORABLE RICHARD A. JONES

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

UNITED STATES OF AMERICA, Plaintiff, v. ROBERT ANDRE FRAZIER, Defendant.	CASE NO. CR16-33RAJ ORDER [REDACTED]

I. INTRODUCTION

THIS MATTER comes before the Court on Defendant Robert Andre Frazier's Motion to Dismiss for Violation of *Brady v. Maryland*. Dkt. # 87. For the reasons set forth below, the Court will **GRANT** the Motion. Rather than dismiss the counts, however, the Court will pursue the less drastic remedy of excluding any and all evidence derived from the confidential informant. Nevertheless, given the Government's proffer – namely that it has no evidence beyond that derived from the confidential informant – the Court will dismiss the indictment.

II. BACKGROUND

Mr. Frazier is charged with a single count of Felon in Possession of a Firearm in violation of 18 U.S.C. § 922(g)(1). *See* Dkt. # 11. Specifically, Mr. Frazier is alleged to have knowingly possessed a firearm on or about November 17, 2015 when he had previously been convicted of a crime punishable by imprisonment for a term exceeding one year. *See id.*

The genesis of the Government's investigation into Mr. Frazier began in November 2015. *See* Aug. 11, 2016 Hrg. Tr., Rongen Test. at 6:21-7:4, 36:19-24 (indicating that CCS Rongen would not have begun an investigation into Mr. Frazier but for receiving information from confidential informant). Kris Rongen, a community corrections specialist ("CCS") with the Washington Department of Corrections ("DOC") (*id.* at 4:5-9), learned that an individual wanted to provide information about Mr. Frazier (*id.* at 7:14-20). That individual was [REDACTED]. *Id.* at 7:25-8:2.

CCS Rongen met with [REDACTED] on November 6, 2015 at the DOC criminal justice center in downtown Seattle. *Id.* at 8:13-21. [REDACTED] reported to that location because [REDACTED], like Mr. Frazier, was on community custody. *Id.* at 8:22-24. CCS Rongen was joined at this meeting by community corrections officer ("CCO") Leslie O'Connor. *Id.* at 9:12-14. Although CCS Rongen had access to [REDACTED]'s chronos,[1] he did not review [REDACTED]'s chronos prior to meeting with [REDACTED]. *See id.* at 10:9-16. However, at that time, CCS Rongen learned that [REDACTED] had a criminal history and that [REDACTED] was at the DOC criminal justice center that day to take a polygraph. *See id.* at 13:9-14:4.

At the meeting, [REDACTED] told CCS Rongen that [REDACTED] had information about a homicide that had taken place a few days prior and that another individual – Mr. Frazier – was in possession of a firearm and was seeking retribution for the victim's death. *See id.* at 11:18-25. CCS Rongen corroborated the information through several avenues (*see id.* at 12:4-22) and brought the case forth at an ATF task force meeting a few days later where he received supervisory approval to continue investigating (*see id.* at 16:10-17:7). Soon after, on November 15, [REDACTED] called CCS Rongen to inform him that Mr. Frazier was staying at the Star Motel in the South

[1] A "chronos" is a chronological note taking system in the DOC's computer system. A note is ordinarily placed in a probationer's chronos whenever the DOC makes contact or meets with the probationer. Aug. 11, 2016 Hrg. Tr., Rongen Test. at 10:4-8. DOC officers have easy access probationers' chronoses. *See id.* at 10:9-11, 37:4-6; O'Connor Test. at 70:20-24.

end of Seattle. *See id.* at 17:8-17, 18:4-9. CCS Rongen set up surveillance at the motel the next day, ultimately observing Mr. Frazier loading a black SUV at the motel. *See id.* at 17:20-18:3, 18:16-19:3. CCS Rongen also spoke with motel management, who confirmed that Mr. Frazier was staying there. *See id.* at 23:11-23. According to Mr. Frazier's probation officer, Mr. Frazier's residence at the Star Motel would violate the terms of his probation. *See id.* at 21:7-22:2. As a result, CCS Rongen and several other officers arrested Mr. Frazier on November 17.[2] *See id.* at 26:13-27:14, 32:21-23.

[REDACTED] had a checkered history. [REDACTED] supervising CCO, Patricia Turner, had reservations about [REDACTED]. *See* Aug. 11, 2016 Hrg. Tr., Turner Test. at 77:21-23, 79:2-10. CCO Turner suspected that [REDACTED] was violating the conditions of [REDACTED] release – and that [REDACTED] was lying to her when [REDACTED] met with her. *See id.* at 79:4-22. These suspicions prompted CCO Turner to investigate [REDACTED], but she was unable to establish enough facts. *See id.* at 79:23-80:9.

As part of this investigation, CCO Turner referred [REDACTED] for a polygraph examination. *See id.* at 80:10-12. [REDACTED] failed it. *Id.* at 86:9-12. CCO Turner likely was informed the day [REDACTED] took the polygraph. *See id.* at 82:14-17. And CCO O'Connor learned from CCO Turner that [REDACTED] failed the polygraph the day she and CCS Rongen met with [REDACTED]. *See id.* O'Connor Test. at 57:23-58:12. Neither of them told CCS Rongen despite having other contact with CCS Rongen. *See id.* O'Connor Test. at 57:23-58:15, Turner Test. at 86:13-87:2. The fact that [REDACTED] failed the polygraph was entered into [REDACTED] chronos just a few days later. *See id.* Turner Test. at 83:4-9.

Beyond [REDACTED] failed polygraph, [REDACTED] also had significant problems complying with the conditions of [REDACTED] community custody. *See id.*

[2] The details and circumstances of the actual arrest are irrelevant for purposes of the instant Motion.

Turner Test. at 89:21-90:23. In fact, [REDACTED] chronos – visible to all DOC officers – reflected these issues and numerous others. *See id.* at 90:25-93:5, 93:23-98:25. Other chronos entries indicated that [REDACTED] admitted to violating the conditions of [REDACTED] community custody, admitted lying to [REDACTED] supervising CCO, and documented reports of [REDACTED]'s drug dealing and pimping activities. *See id.* Neither CCO Turner nor CCO O'Connor provided this information to CCS Rongen prior to the November 6, 2015 meeting with [REDACTED]. *See id.* at 99:1-5. In fact, CCO Turner expressly relied on CCO O'Connor to convey this information to CCS Rongen. *See id.* at 100:21-23.

[REDACTED] continued to violate the conditions of [REDACTED] community custody after November 6. For example, when CCO Turner confronted [REDACTED] about [REDACTED] failed polygraph, [REDACTED] not only continued to lie, but admitted to pimping activities. *See id.* at 102:14-103:25. Despite knowing that [REDACTED] was being used as a witness before a grand jury in Mr. Frazier's case, CCO Turner still did not present her concerns about [REDACTED]'s credibility to the prosecutors. *Id.* at 104:1-9.

Whatever the case, Mr. Frazier was arraigned on February 16, 2016. *See* Dkt. # 17. And just a few days later, [REDACTED] died. *See* Aug. 11, 2016 Hrg. Tr., Turner Test. at 105:3-10. None of this information about [REDACTED] was disclosed to Mr. Frazier until July 22, 2016 (*see* Dkt. # 87-1, Ex. A at 2), mere days before the date of trial (*see* Dkt. # 25) and the hearing date for Mr. Frazier's motion to suppress (*see* July 6, 2016 Docket Entry). This is in spite of the fact that Mr. Frazier's public defender in the state court proceedings requested discovery in November 2015 (*see* Dkt. # 103 at 3) and that Mr. Frazier's counsel requested discovery pursuant to Local Rule 16[3] during Mr. Frazier's arraignment hearing in the instant case (*see* Dkt. # 17).

[3] This Local Rule covers, of course, *Brady* material. *See* Local Rules. W.D. Wash. CrR 16(a)(1)(K).

III. ANALYSIS

The requirements for establishing a *Brady* violation are well known. A defendant generally must show three elements: favorability, suppression, and materiality. In other words, "[t]he evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." *United States v. Olsen*, 704 F.3d 1172, 1181 (9th Cir. 2013) (quoting *Gentry v. Sinclair*, 693 F.3d 867, 887 (9th Cir. 2012)). Suppression may be either intentional or inadvertent, and even "[a]n 'innocent' failure to disclose favorable evidence constitutes suppression even where there is no allegation that the prosecutor acted 'willfully, maliciously, or in anything but good faith'—'sins of omission are equally within *Brady*'s scope.'" *Id.* (quoting *United States v. Price*, 566 F.3d 900, 907 (9th Cir. 2009)). Finally, "[e]vidence is prejudicial or material 'only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.'"[4] *United States v. Kohring*, 637 F.3d 895, 902 (9th Cir. 2011) (quoting *United States v. Bagley*, 473 U.S. 667, 682 (1985)).

The Court finds that all three elements are met.

The suppressed evidence regarding [REDACTED]'s credibility is clearly favorable. "*Brady* encompasses impeachment evidence, and evidence that would impeach a central prosecution witness is indisputably favorable to the accused." *Price*, 566 F.3d at 907 (citing *Giglio v. United States*, 405 U.S. 150, 154 (1972); *United States v. Blanco*, 392 F.3d 382, 387 (9th Cir. 2004)). The sole basis for CCS Rongen's decision to investigate Mr. Frazier rested on information he received from [REDACTED]. As a result, whether [REDACTED] testified or not, [REDACTED] credibility was at issue.

[4] Numerous courts have commented that the pretrial standard is even more exacting, requiring prosecutors to disclose any favorable information without attempting to predict whether its disclosure will affect the outcome of trial. *See Olsen*, 704 F.3d at 1183 n.3 (collecting cases); *see also Price*, 566 F.3d at 913 n.14 (citing *United States v. Acosta*, 357 F. Supp. 2d 1228, 1239-40 (D. Nev. 2005); *United States v. Sudikoff*, 36 F. Supp. 2d 1196 (C.D. Cal. 1999)).

Underscoring [REDACTED]'s centrality to this case, the Government relied upon [REDACTED]'s testimony to support its indictment.

Moreover, the evidence was plainly suppressed. It was not produced until the eve of trial and well after [REDACTED]'s death. Untimely production of a witness' testimony may qualify as suppression for *Brady* purposes, particularly where disclosure occurs at a time where disclosure is no longer helpful to the accused. *See United States v. Aguilar*, 831 F. Supp. 2d 1180, 1203-06 (C.D. Cal. 2011); *see also United States v. Gamez-Orduno*, 235 F.3d 45, 461 (9th Cir. 2000) (quoting *United States v. Span*, 970 F.2d 573, 583 (9th Cir. 1992)) ("Such a due process violation may be cured, however, by belated disclosure of evidence, so long as the disclosure occurs at a time when disclosure would be of value to the accused.") (internal quotation marks omitted); *cf. United States v. Miller*, 529 F.2d 1125, 1128 (9th Cir. 1976) (citing *United States v. Hiber*, 463 F.2d 455, 459 (9th Cir. 1972) (indicating that the pertinent issue "is whether the lateness of the disclosure so prejudiced appellant's preparation or presentation of his defense that he was prevented from receiving his constitutionally guaranteed fair trial"). And the evidence here was certainly unhelpful to Mr. Frazier by the time it was disclosed. [REDACTED] had long since passed away by the time the Government even disclosed [REDACTED] identity to Mr. Frazier, leaving Mr. Frazier with no real opportunity to investigate the basis for [REDACTED]'s knowledge, [REDACTED]'s motivations for assisting the Government, or for cross-examining and impeaching [REDACTED] testimony.

And finally, Mr. Frazier was prejudiced by the Government's late disclosure. It is abundantly clear that Mr. Frazier was never provided an opportunity to investigate [REDACTED] (and [REDACTED] checkered past). And the fact that this impeachment evidence was not provided until after [REDACTED]'s death only compounds the prejudice Mr. Frazier faces. *See United States v. Fitzgerald*, 615 F. Supp. 2d 1156, 1161-62 (S.D. Cal. 2009) (finding that defendant suffered substantial prejudice from *Brady*

violation where government suppressed evidence impeaching the credibility of its key witness until after witness had testified and then died).

Having found that a *Brady* violation has occurred, the question turns to the appropriate remedy. Mr. Frazier requests that the Court dismiss the indictment, but a district court generally may only do so if the Government's conduct is outrageous so as to constitute a due process violation or in cases of flagrant prosecutorial misconduct. *See United States v. Chapman*, 524 F.3d 1073, 1084 (9th Cir. 2008). Moreover, in order for a district court to dismiss an indictment under its supervisory powers, the defendant must have suffered substantial prejudice and there may be no lesser remedial action available. *See id.* at 1087 (citing *United States v. Jacobs*, 855 F.2d 652, 655 (9th Cir. 1988); *United States v. Barrero-Moreno*, 951 F.2d 1089, 1092 (9th Cir. 1991)).

"[T]he Supreme Court as well as the Ninth Circuit has repeatedly pointed out that dismissal of an indictment, particularly with prejudice, is a drastic measure." *United States v. Isgro*, 974 F.2d 1091, 1098 (9th Cir. 1992). Instead, "when faced with prosecutorial misconduct, a court should 'tailor[ ] relief appropriate in the circumstances.'" *Id.* (quoting *United States v. Morrison*, 449 U.S. 361, 365 (1981)).

The circumstances here do not necessarily support dismissal. The Government's conduct here was unabashedly negligent. It withheld [REDACTED]'s identity (and the abundant concerns about [REDACTED] credibility) despite initiating its investigation of Mr. Frazier based solely on [REDACTED] information and, just as critically, using [REDACTED] as a witness to support the indictment. In fact, the Government withheld impeaching information beyond mere questions about [REDACTED]'s criminal history – it did not reveal benefits that [REDACTED] received for [REDACTED] cooperation. Specifically, [REDACTED] received $200 and CCS Rongen may have left a message for [REDACTED]'s CCO informing her that [REDACTED] would be late for [REDACTED] curfew. *See* Aug. 11, 2016 Hrg. Tr., Rongen Test. at 24:24-25:21. Indeed, the Government continued to withhold evidence impeaching [REDACTED]'s

credibility after [REDACTED] death. This was in spite of the fact that every DOC officer involved in this case has had access to (and some knowledge of) [REDACTED]'s many veracity problems. This information was of course imputed to the prosecutor. *See Aguilar v. Woodford*, 725 F.3d 970, 982 (9th Cir. 2013) (citing *Kyles v. Whitley*, 514 U.S. 419, 437 (1995)). Ultimately, however, even negligent behavior will not necessarily support dismissal. *See United States v. Dominguez*, 641 F. App'x 738, 740 (9th Cir. 2016) (affirming district court's imposition of sanctions rather than dismissal of indictment where the Government conceded "that it was 'sloppy, inexcusably tardy, and almost grossly negligent' and [did] not dispute the district court's findings that it committed numerous *Brady, Giglio*, *Jencks* Act, and Rule 16 violations.").[5]

In this Court's view, the proper remedy here is exclusion and suppression of all evidence derived from [REDACTED]. Specifically, the Court excludes any and all evidence connected to [REDACTED]'s activities as it relates to the investigation of Mr. Frazier. If [REDACTED] was still alive, the prejudice could readily be cured – particularly as trial has not yet taken place. *See Kohring*, 637 F.3d at 913 (citing *Chapman*, 524 F.3d at 1086) (indicating that the appropriate remedy for a *Brady* violation is typically a new trial). Unfortunately, because of [REDACTED]'s death, that option is not available – and there really is no lesser remedy available. *See Fitzgerald*, 615 F. Supp. 2d at 1162.

[5] Generally speaking, the appropriate remedy for a *Brady/Giglio* violation is a new trial. *See Kohring*, 637 F.3d at 913 (quoting *Chapman*, 524 F.3d at 1086). And, the Ninth Circuit has found that even egregious government misconduct may not necessarily warrant dismissal of an indictment. *See United States v. Struckman*, 611 F.3d 560, 577-78 (9th Cir. 2010) (affirming district court's remedy of suppression of evidence, not dismissal of indictment where the Government lied about the identity of a confidential informant, failed to disclose an IRS audit of a Government witness by lying that it did not exist, and Government's agent concealed deal between the Government and the witness); *see also Kohring*, 637 F.3d at 912-13 (remanding for new trial where Government suppressed evidence that key witness was investigated for sexual misconduct with minors, that cast doubt on his memory, and that suggested he made payments to legislator-defendant out of friendship and pity rather than corrupt *quid-pro-quo* relationship, as well as other impeaching evidence).

In addition, the Court finds that this remedy is appropriate to address the Government's conduct in this case. After hearing testimony from CCS Rongen, CCO O'Connor, and CCO Turner, the Court is convinced that the Government's agents have taken a cavalier attitude toward their *Brady* obligations. This information was not disclosed to Mr. Frazier – either during the state court proceedings or in the instant case – even though each of these individuals had knowledge and ready access to [REDACTED]'s problematic conduct. In fact, if Mr. Frazier had received this information during the state court proceedings – or even immediately after being arraigned in the instant case – he may have been able to properly investigate [REDACTED]'s background prior to [REDACTED] death. Mr. Frazier is no longer able to do so. Instead, the Government continued to minimize the egregiousness and prejudice to Mr. Frazier caused by the nondisclosure even when confronted with the behavior of its agents. *See* Dkt. # 100. In this Court's view, that unwillingness to own up to this misconduct supports this remedy. *See Chapman*, 524 F.3d at 1087 (quoting *United States v. Kojayan*, 8 F.3d 1315, 1318 (9th Cir. 1993)).

Additionally, the Court finds that this remedy is appropriate to deter future illegal conduct. That consideration is, of course, important in the Court's exercise of its supervisory power. *See Chapman*, 524 F.3d at 1085 (quoting *United States v. Simpson*, 927 F.2d 1088, 1090 (9th Cir. 1991)). The officers involved in this investigation continuously passed on their obligations to disclose information about [REDACTED], even when they had actual knowledge or ready access to this information. The Court will not countenance such a careless attitude toward their obligations to identify evidence favorable to the defendant.

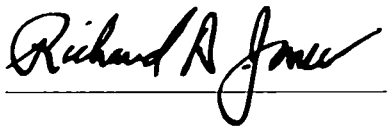
IV. CONCLUSION

For the foregoing reasons, the Court **GRANTS** Defendant's motion.

The Court recognizes that the AUSA was placed in an increasingly untenable position, especially as the full extent of the Government's misconduct was slow to

develop. In these circumstances, the Court acknowledges that the AUSA acted promptly when the evidence of [REDACTED]'s reliability and veracity finally came to light. But ultimately, "the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police." *See Kyles*, 514 U.S. at 437. That did not happen here.

DATED this 24th day of August, 2016.



The Honorable Richard A. Jones
United States District Judge

Tracy, Mary

From: OFFICE RECEPTIONIST, CLERK
Sent: Friday, April 19, 2019 11:54 AM
To: Tracy, Mary
Subject: FW: Comment to Proposed CrR Amendments
Attachments: FRAZIER DISMISSAL ORDER.pdf

From: Emily M. Gause [mailto:emily@emilygauselaw.com]
Sent: Friday, April 19, 2019 11:52 AM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Subject: RE: Comment to Proposed CrR Amendments

I inadvertently forgot to attach this order, which was reference in my letter as an attachment. Can you add it?

Thank you so much,

Emily M. Gause
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130 Andover Park East, Suite 300
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From: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Sent: Friday, April 19, 2019 8:11 AM
To: 'Emily M. Gause' <emily@emilygauselaw.com>
Subject: RE: Comment to Proposed CrR Amendments

Your comments have been forwarded to the rules committee.

Thank you,

Receptionist
Supreme Court Clerk's Office
360-357-2077

From: Emily M. Gause [mailto:emily@emilygauselaw.com]
Sent: Thursday, April 18, 2019 8:00 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Cc: emily@emilygauselaw.com
Subject: Comment to Proposed CrR Amendments

Please see my attached comments to the proposed criminal court rules.

Thank you,

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Tracy, Mary

From: OFFICE RECEPTIONIST, CLERK
Sent: Friday, April 19, 2019 8:10 AM
To: Tracy, Mary
Subject: FW: Comment to Proposed CrR Amendments
Attachments: GAUSE Comments to WACDL Court Rules March 2019.pdf

From: Emily M. Gause [mailto:emily@emilygauselaw.com]
Sent: Thursday, April 18, 2019 8:00 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Cc: emily@emilygauselaw.com
Subject: Comment to Proposed CrR Amendments

Please see my attached comments to the proposed criminal court rules.

Thank you,

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