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April 30, 2019

The Supreme Court Rules Committee
c/o Clerk of the Supreme Court
P.O. Box 40929
Olympia, WA 98504-0929

Via email to supreme@courts.wa.gov

Re: Comments to Proposed Amendments to CrR/CrRLJ 4.7, 4.11, 3.7, 3.8 & 3.9

Dear Supreme Court Rules Committee:

I urge the Court adopt the proposed amendments to the criminal rules and reject efforts to maintain Washington's non-conformity with *Brady* and its progeny.

I have practiced law for 35 years, the last 27 years almost exclusively in criminal defense. Although the majority of my practice is misdemeanor defense, I also practice felony defense. My comments apply with equal force to the superior court rules as they do to the limited jurisdiction court rules.

CrR/CrRLJ 4.7 and *Brady* Material

The United States Supreme Court ruled that prosecutors are obligated to comply with the obligations imposed by the proposed amendments to CrR/CrRLJ 4.7, so opposition to this proposal is inexplicable. Far too often, prosecutors tell me if it isn't in "the knowledge, possession, or control of members of the prosecuting attorney's staff," or if the material is merely impeachment evidence, they have no obligation. Although the present court rule says that, nothing is be farther from the truth.

Brady v. Maryland, 373 U.S. 83, 87 (1963) holds that prosecutors' failure to turn over to the defense any evidence favorable to an accused on either the issue of guilt or the issue of punishment violates due process "irrespective of the good faith or bad faith of the prosecution," such a violation of due process is not subject to any "harmless error" analysis, but requires automatic reversal of the conviction, and the obligation to disclose potentially exculpatory evidence exists whether that evidence is known to the prosecutor or merely to the police. *Kyles v. Whitley*, 514 U.S. 419 (1995).

The present rule requires prosecutors to disclose material or information within their knowledge which tends to negate a defendant's guilt as to the offense charged. CrR/CrRLJ 4.7(a)(3). However, it doesn't require prosecutors to disclose material and information which tends to impeach state witnesses as constitutionally required 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). *See United States v. Bagley*, 473 U.S. 667, 676 (1985) (*Brady* duty encompasses impeachment evidence as well as exculpatory evidence.) CrR/CrRLJ 4.7(a)(3) should be amended to include **both** exculpatory and impeachment evidence.

Contrary to constitutional requirements, CrR/CrRLJ 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" rather than imposing any obligation on prosecutors to seek out evidence favorable to defendants. This limitation directly conflicts with controlling US 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." 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.

These constitutional due process requirements could not be clearer. Yet a review of prosecutorial comments in opposition shows either a fundamental misunderstanding of prosecutors' obligations under *Brady* or a refusal to accept and comply with *Brady* requirements. Let's look at three examples.

Information that "tends to impeach a witness:" *United States v. Bagley*, 473 U.S. 667, 676 (1985) requires disclosure of evidence that might be used to impeach a witness.

> [I]n 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 (1972). Such evidence is "evidence favorable to an accused," *Brady*, 373 U.S., at 87, so that, if disclosed and used effectively, it may make the difference between conviction and acquittal.

Yet 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." It does not! The language in the proposed rule comes directly from the *Bagley* decision. It does not exceed well-settled *Brady* requirements: it codifies well-settled *Brady* requirements in the court rule.

Information in the hands of the "prosecution team including police:" *Kyles v. Whitley*, 514 U.S. 419 (1995) requires prosecutors to disclose potentially exculpatory evidence whether known to the prosecutor ***or merely to the police.*** This obligation applies to evidence "known only to police investigators and not to the prosecutor," *Youngblood v. West Virginia*, 547

U.S. 867, 870 (2006) (*quoting Kyles v. Whitley*, 514 U.S. at 438), and requires prosecutors "to learn of any favorable evidence known to others acting in the government's behalf," including law enforcement. *Caruiger v. Stewart*, 132 F.3d 463, 479-80 (9th Cir. 1997).

In spite of over twenty-two years of precedent, Kittitas County Prosecutor Gregory Zempel contends the obligation to seek out and learn information in others' hands in "(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." Prosecutor Zempel's claim that his office has no duty to seek exculpatory or impeachment information from the investigating law enforcement agency is flatly inconsistent with *Kyles v. Whitley*. And, the rule is not unworkable. Prosecutors elsewhere comply with the obligation to seek out information in law enforcement agencies hands.

The "prosecution team" includes each and every member of the prosecutor's staff and law enforcement agencies. *See United States v. Antone*, 603 F.2d 566, 569 (5th Cir. 1979); United *States ex rel Smith v. Fairman*, 769 F.2d 386, 391-92 (7th Cir. 1985). It is not limited to the prosecutor's office, nor is it limited to the individual prosecutor assigned to a case. *Giglio v. United States*, 405 U.S. 150, 154 (1972); *Benn v. Lambert*, 283 F.3rd 1040 (9th Cir. 2002). The language in the proposed rule and the obligations imposed by (a)(4) come directly from the US Supreme Court's precedent. The language does not exceed well-settled *Brady* requirements: it too codifies well-settled *Brady* requirements in the court rule, and shows well the reasons the criminal court rule is necessary.

Impeachment Evidence:" The disclosure of material and information which tends to impeach any state witness is constitutionally required 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). *See United States v. Bagley*, 473 U.S. 667, 676 (1985) (*Brady* duty encompasses impeachment evidence as well as exculpatory evidence.) Prosecutors are obligated to seek out information and materials in the "prosecution team's" hands.

In spite of this, Deputy Prosecuting Attorney Tod Bergstrom objects that a prosecutor's obligation to find and disseminate to defense "favorable evidence known to other's acting on the state's behalf, including the police including IMPEACHMENT evidence" is a task "impossible to fulfill." But *Kyles v. Whitley*, 514 U.S. 419, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995) makes this the prosecutor's duty and 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." *Kyles* imposes a duty to seek information on prosecutors. This is nothing new as far as the US Supreme Court is concerned. The Washington court rules should incorporate this obligation.

Many conscientious prosecutors work to comply with their *Brady* obligations. Others do not, possibly because existing court rules ignore *Brady* requirements, possibly because prosecutorial staffs are not in favor of the *Brady* requirements, and possibly for other reasons.

There is no reason to ignore US Supreme Court precedent and no reason to reject *Brady*. If anything, the comments opposing the proposed amendment to CrR/CrRLJ 4.7(a)(4) demonstrate the need for the rule.

Proposed Amendments to CrR/CrRLJ 4.11, 3.7, 3.8 & 3.9

Although my comments focused on the discovery rule, I join my enlightened colleagues in strongly urging the adoption of the proposed amendments to CrR/CrRLJ 4.11, 3.7, 3.8 & 3.9. In an age where digital electronics are cheap, the public expects body cam audio and video, confession, eyewitness, and identification evidence aren't always reliable, and the Innocence Project finds too many wrongfully convicted, adopting the amendments is a small price to pay for a more just and reliable justice system.

Thank you for considering my comments.

Sincerely,

GODDARD WETHERALL WONDER PSC

Digitally signed by Scott E. Wonder
Date: 2019.04.30 13:01:01 -07'00'

SCOTT E. WONDER

Tracy, Mary

From: OFFICE RECEPTIONIST, CLERK
Sent: Tuesday, April 30, 2019 1:05 PM
To: Tracy, Mary
Subject: FW: Comments to Proposed Amendments to CrR/CrRLJ 4.7, 4.11, 3.7, 3.8 & 3.9
Attachments: Proposed Rules LT Washington Supreme Court-SEW.pdf

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From: Scott Wonder [mailto:scottwonder@gwwp.com]
Sent: Tuesday, April 30, 2019 1:04 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Subject: Comments to Proposed Amendments to CrR/CrRLJ 4.7, 4.11, 3.7, 3.8 & 3.9

Attached please find my letter with comments to the proposed amendments to CrR/CrRLJ 4.7, 4.11, 3.7, 3.8 & 3.9.

Thank you.

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