WSR 24-01-051
RULES OF COURT
STATE SUPREME COURT
[December 7, 2023]

IN THE MATTER OF THE SUGGESTED AMENDMENTS TO CrR 4.7—DISCOVERY AND CrRLJ 4.7—DISCOVERY	))))	ORDER NO. 25700-A-1558

The King County Department of Public Defense, the Washington State Office of Public Defense, and the Washington Defender Association, having recommended the suggested amendments to CrR 4.7—Discovery and CrRLJ 4.7—Discovery, and the Court having approved the suggested amendments for publication;

Now, therefore, it is hereby

ORDERED:

(a) That pursuant to the provisions of GR 9(g), the suggested amendments as shown below are to be published for comment in the Washington Reports, Washington Register, Washington State Bar Association and Administrative Office of the Court's websites in January 2024.

(b) The purpose statement as required by GR 9(e) is published solely for the information of the Bench, Bar and other interested parties.

(c) Comments are to be submitted to the Clerk of the Supreme Court by either U.S. Mail or Internet E-Mail by no later than April 30, 2024. Comments may be sent to the following addresses: P.O. Box 40929, Olympia, Washington 98504-0929, or supreme@courts.wa.gov. Comments submitted by e-mail message must be limited to 1500 words.

DATED at Olympia, Washington this 7th day of December, 2023.

For the Court

Gonzalez, C.J.

CHIEF JUSTICE

GR9 COVER SHEET

A. Name of Proponent: The King County Department of Public Defense, the Washington State Office of Public Defense and the Washington Defender Association

B. Spokesperson: Anita Khandelwal, Larry Jefferson, and Christie Hedman

C. Purpose: Allow accused individuals to receive timely redacted discovery by amending CrR 4.7/CrRLJ 4.7

D. A public hearing is not recommended.

E. Expedited Consideration is not requested.

Introduction

The King County Department of Public Defense, the Washington State Office of Public Defense and the Washington Defender Association propose changes to CrR 4.7/CrRLJ 4.7 to allow redacted discovery to be provided to an accused individual according to redaction guidelines that are published by each Court.

Timely access to redacted discovery is essential for those accused of crimes. By granting access to pertinent evidence and informa-

tion, those accused of crimes can gain a comprehensive understanding of the allegations against them. This access empowers accused people to work with their attorney and engage in meaningful discussions about necessary investigation, negotiations, and trial preparation.

While CrR/CrRLJ 4.7 allows a pathway for the accused to receive redacted discovery, this pathway is frequently blocked by prosecutorial threats to significantly limit negotiations if an accused asks for redacted discovery. For example, the King County Prosecuting Attorney's website states that:

Discovery: The KCPAO will make its best effort to provide all discovery for the defense that is available at the time of filing or that becomes available thereafter. If the defendant requests a copy of redacted discovery, the early plea negotiator will discontinue negotiations and will have the case assigned to a trial deputy. We are unable to provide redacted discovery with our limited early plea staff. *See* https://kingcounty.gov/depts/prosecutor/criminal-overview/early-plea.aspx.

If a case is move out of the "Early Plea Unit", the accused is clearly disadvantaged —

> The Early Plea Unit (EPU) stage is where the King County Prosecuting Attorney's Office (KCPAO) negotiates its cases. This is the "pre-trial track" where the KCPAO will consider reductions, alternative programs (such as Drug Diversion Court and Regional Mental Health Court), mitigation information, equitable considerations, etc. Once a case moves past the "pre-trial track", a decision by a Deputy Prosecuting Attorney (DPA) to reduce or dismiss charges will generally be limited to the sufficiency of the evidence to prove the charge(s), and such reductions must also be approved by a supervisor. *See* https://kingcounty.gov/depts/prosecutor/criminal-overview/early-plea.aspx.

Without changes to CrR 4.7/CrRLJ 4.7, coercive plea-bargaining practices that condition negotiations or a plea deal on not obtaining redacted discovery for the accused will continue. Such practices can lead people to accept unfair or uninformed plea deals and the Court should act to discourage such practices. *See* Alkon, C., *Hard Bargaining in Plea Bargaining: When Do Prosecutors Cross the Line?*, Nev. L.J., Vol. 17, No. 2, (2017) ("prosecutors should also not be allowed to continue the practice of taking offers off the table if or when the defense files certain motions, such as search and seizure motions").

Ensuring that the accused can access redacted discovery is particularly important where discovery is voluminous. In those cases, it is extremely time-consuming for a member of the defense team to review each page of discovery with the accused. The impact is particularly severe for public defenders and other attorneys with high caseloads and can create a double standard where some clients are able to pay attorneys with low caseloads to immediately meet with them to review each page of discovery - especially if that person is incarcerated. The accused should have quick access to redacted discovery without legal repercussions - a policy that punishes access to discovery, as allowed under CrR 4.7, undermines fairness in the criminal legal system.

In 2018, the Washington Association of Criminal Defense Lawyers proposed amendments to CrR 4.7/CrRLJ 4.7 which were not adopted. This

rule change proposes that, instead of amending the court rule to detail the appropriate items for redaction[1] (including year of birth, initials for names of minor children, redacting social security information, passport/driver's license number, the last 4 numbers of financial accounting information, the city/state of home address and phone numbers), that each individual Court be required to develop redaction protocols through a local rule[2] and then allow defense to redact discovery consistent with these protocols.

1 The change in these proposed amendments addresses some of the previous objections to the rule change. For example, regarding the previous rule change attempt, Dan Satterberg had noted that the 'proposed list of redactions is profoundly inadequate and noted a number of items that should be redacted". In fact, the King County Prosecuting Attorney's Office, has a number of disseminated "redaction guidelines". *See* https://www.courts.wa.gov/court_Rules/proposed/2018Jul/Proposed%20Changes%20to%20CrR%204.7%20- %20Discovery/Dan%20Satterberg%20-%20CrR%203.7%20et%20al.pdf

2 At present, some prosecutor's offices, like KCPAO, have already disseminated "redaction guidelines" regarding replacing names with initials, redacting victim address/contact information, dates of birth, social security, financial, identification card numbers, vehicle identification umbers, firearm serial numbers and descriptions of sexual contact. In addition, a number of items may not be provided to defendants (absent a court order), most electronic discovery, autopsy reports, medical, mental health, counseling, CPS records, photographs/video recordings with images of a person or animal. The guidelines also provide that – "In cases where there are extensive APS and/or financial records, defense counsel should contact the assigned DPA to discuss necessary redactions prior to submitting proposed redactions for review Additional redaction may be required by the individual Deputy Prosecuting Attorney as relevant to any specific case."

Proposed Amendments to CrR/CrRLJ 4.7 DISCOVERY

CrR 4.7

DISCOVERY

(a)-(g) [Unchanged]

(h) Regulation of Discovery.

(1)-(2) [Unchanged]

(3) *Custody of Materials*. Any materials furnished to ~~an~~ a defendant and/or attorney pursuant to these rules shall remain in the exclusive custody of the defendant and/or attorney and be used only for the purposes of conducting the party's side of the case, unless otherwise agreed by the parties or ordered by the court, and shall be subject to such other terms and conditions as the parties may agree or the court may provide. ~~Further, a defense attorney shall be permitted to provide a copy of the materials to the defendant after making appropriate redactions which are approved by the prosecuting authority or order of the court.~~ Further, each Municipal, District and Superior Court shall, through the local rule-making process under CrR/CrRLJ 1.7, publish guidelines for redactions within three months of adoption of this rule. Defense counsel may redact discovery consistent with these guidelines and provide a copy of the discovery to the accused. Each defense attorney-shall maintain a duplicate copy of discovery furnished to the represented defendant that show the redactions made in accordance with this court rule. The duplicate copy of discovery with redactions shall be kept in the defendant's case file for the duration of the case.

a. a. A prosecuting attorney may motion the court for an order to modify redactions beyond the Court's published guidelines by scheduling a hearing within 7 days of the discovery being provided to defense counsel to address what additional redactions beyond their guidelines are required.

b. A defense attorney may motion the court for an order to modify redaction conditions.

(4)-(7) [Unchanged]

Conclusion:

The current practices around redacted discovery allow the accused to be punished for wanting to fully understand the allegations against them. The Court should act to allow accused individuals to receive

discovery consistent with Court published redaction protocols; doing so will advance fairness and due process within the legal system.

Proposed Amendments to CrR/CrRLJ 4.7 DISCOVERY

(a)-(g) [Unchanged]

(h) Regulation of Discovery.

(1)-(2) [Unchanged]

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a. A prosecutor attorney may motion the court for an order to modify redactions beyond the Court's published guidelines by scheduling a hearing within 7 days of the discovery being provided to defense counsel to address what additional redactions beyond their guidelines are required.

b. A defense attorney may motion the court for an order to modify redaction conditions.

(4)-(7) [Unchanged]

Reviser's note: The typographical errors in the above material occurred in the copy filed by the state supreme court and appear in the Register pursuant to the requirements of RCW 34.08.040.