FILED
SUPREME COURT
STATE OF WASHINGTON
4/16/2018 3:29 PM
BY SUSAN L. CARLSON
CLERK

FILED
SUPREME COURT
STATE OF WASHINGTON
4/25/2018
BY SUSAN L. CARLSON
CLERK

NO. 93812-1

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

CITY OF KIRKLAND,

Respondent,

v.

HOPE STEVENS,

Petitioner

BRIEF OF *AMICI CURIAE* WASHINGTON DEFENDER ASSOCIATION and WASHINGTON ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITONER

CHRISTINE JACKSON, #17192
Christine.Jackson@kingcounty.gov
SKYLAR BRETT, #45475
skylarbrettlawoffice@gmail.com
LAUREN MCLANE, #40945
mclanel@uw.edu
MAGDA BAKER, #30655
magda@defensenet.org
Washington Defender Association
110 Prefontaine Pl. S, Suite 610
Seattle, WA 98104
(206)623-4321

CHRISTINE JACKSON, #17192
Christine.Jackson@kingcounty.gov
Washington Association of Criminal Defense Lawyers
c/o Christine Jackson
The Defender Association Division,
King County Department of Public Defense
810 Third Avenue, Suite 800
Seattle, WA 98104

Table of Contents

Table of Authorities

Cases

Other Authorities

I. IDENTITY AND INTEREST OF AMICI CURIAE

WDA is a statewide non-profit organization founded in 1983 whose membership is comprised of public defender agencies, indigent defenders and those who are committed to seeking improvements in indigent defense. WDA is a not-for-profit corporation with 501(c)(3) status. The WDA's objectives and purposes are defined in its bylaws and include: protecting and insuring by rule of law those individual rights guaranteed by the Washington and Federal Constitutions, including the right to counsel, and to resist all efforts made to curtail such rights; promoting, assisting, and encouraging public defense systems to ensure that all accused persons receive effective assistance of counsel.

WDA representatives frequently testify before the Washington House and Senate on proposed legislation affecting indigent defense issues. WDA has been granted leave on prior occasions to file amicus briefs in this Court. WDA represents over 30 public defender agencies and has over 1,500 members comprising criminal defense attorneys, investigators, social workers and paralegals throughout Washington. The issues in this

case are important to public defenders, who have high caseloads and represent many of the people accused of misdemeanors in Washington.[1]

The Washington Association of Criminal Defense Lawyers ("WACDL") is a non-profit organization formed in 1987 and is dedicated to improve the quality and administration of justice. WACDL has over 900 members consisting of private criminal defense lawyers, public defenders, and related professionals committed to preserving fairness and promoting a rational and humane criminal justice system. WACDL holds many seminars throughout the year to educate lawyers on pertinent issues related to the defense of citizens accused of all crimes, including misdemeanors, in Washington. The WACDL has previously been granted amicus status in Washington appellate cases, too many to list in this petition.

This Court's decision in this case has potentially far-reaching implications to criminal practice in courts of limited jurisdiction in Washington. The purpose of this brief is to discuss the history and context of the misdemeanor court rule that governs sanctions for discovery violations, CrRLJ 4.7(g)(7). Amici have significant expertise on the issues presented in the instant case based on their members' appearance in courts

[1] According to estimates by the Washington Office of Public Defense, public defenders represent approximately 60% of people accused of crimes in courts of limited jurisdiction.

of limited jurisdiction across Washington and training and assistance they offer to those members.

II. ISSUE TO BE ADDRESSED BY AMICUS

Whether CrRLJ 4.7(g)(7)(ii) allows a court of limited jurisdiction to dismiss a misdemeanor based on a discovery violation of a third party—such as an uncooperative witness—and, if not, if the Sixth Amendment right to counsel requires dismissal.

III. STATEMENT OF THE CASE

Amici adopt the facts as stated in Ms. Stevens' supplemental brief.

IV. ARGUMENT

At issue in this case is the Criminal Rule for Courts of Limited Jurisdiction (CrRLJ) 4.7(g)(7), which governs discovery in misdemeanor courts and permits dismissal when there are intentional or grossly negligent discovery violations by witnesses who are third parties to the case. The rules of statutory construction, the history of the rule, and the volume of cases in courts of limited jurisdiction all support a reading of CrRLJ 4.7(g)(7) that allows for dismissal based on willful or grossly negligent misconduct by third parties. Even if this court does not adopt a reading of CrRLJ 4.7(g)(7) that allows for dismissal based on the discovery violations by third parties, the actions of the witnesses here

deprived the defendant of the effective assistance of counsel and the court must uphold the trial court's dismissal based on the Sixth Amendment to the United States Constitution.

A. CrRLJ 4.7(g)(7)(ii) applies to a non-party's willful or grossly negligent discovery violations and authorizes the court to dismiss the case when their conduct prejudices the accused.

Courts of limited jurisdiction are empowered to protect the accused's right to a fair trial with the sanctions for discovery abuses listed in CrRLJ 4.7(g)(7).[2] The three subsections of CrRLJ 4.7(g)(7) authorize sanctions under separate and distinct circumstances. The first and third subsections authorize enumerated sanctions for violations committed by a party or a lawyer. The second subsection, at issue here, specifically authorizes the court to sanction wrongdoing by dismissing the case where the violation was willful or grossly negligent and prejudiced the accused.

[2] That subsection of CrRLJ 4.7 reads in full:
(i) If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with an applicable discovery rule or an order issued pursuant thereto, the court may order such party to permit the discovery of material and information not previously disclosed, grant a continuance, or enter such other order as it deems just under the circumstances.
(ii) The court may at any time dismiss the action if the court determines that failure to comply with an applicable discovery rule or an order issued pursuant thereto is the result of a willful violation or of gross negligence and that the defendant was prejudiced by such failure.
(iii) A lawyer's willful violation of an applicable discovery rule or an order issued pursuant thereto may subject the lawyer to appropriate sanctions by the court.

The second subsection, unlike the other two subsections, is not limited to a specific class of persons or participants in the litigation. It says that a court may dismiss if there is violation of a discovery rule or order, and it does not say who must have committed that violation:

> (ii) The court may at any time dismiss the action if the court determines that failure to comply with an applicable discovery rule or an order issued pursuant thereto is the result of a willful violation or of gross negligence and that the defendant was prejudiced by such failure.

Compare CrRLJ 4.7(g)(7)(ii), *with* CrRLJ 4.7(g)(7)(i) (discussing "a party" who fails to comply with a discovery rule or order), *and* CrRLJ 4.7(g)(7)(iii) (discussing "a lawyer's" willful discovery violation).

1. The plain language of CrRLJ 4.7(g)(7)(ii) shows that it applies to non-parties.

A court will interpret a court rule as though it were enacted by the legislature, giving effect to its plain meaning as an expression of legislative intent. *State v. Greenwood*, 120 Wn.2d 585, 592, 845 P.2d 971 (1993). A court will discern plain meaning by reading the rule as a whole, harmonizing its provisions, and using related rules to help identify the legislative intent embodied in the rule. *State v. Williams*, 158 Wn.2d 904, 908, 148 P.3d 993 (2006). Here, the plain meaning of CrRLJ 4.7(g)(7)(ii) is clear. Subsections (i) and (iii) refer to discovery violations by "a party" and "a lawyer." Subsection (ii), on the other hand, allows for dismissal

based on any discovery violation as long as it is willful or grossly negligent and prejudices the defendant.

Courts will not alter the pertinent language of a statute or court rule. *State v. Delgado*, 148 Wn.2d 723, 727, 63 P.3d 792 (2003) ("We cannot add words or clauses to an unambiguous statute where the legislature has chosen not to include that language"). The court cannot read into subsection (ii) language requiring the misconduct to be committed by a certain entity.

A corollary to the rule that a court will give effect to a court rule's plain language is the rule that where the legislature uses different terms, a court will deem the legislature to have intended different meanings. *In re Forfeiture of One 1970 Chevrolet Chevelle*, 166 Wn.2d 834, 842, 215 P.3d 166, 170 (2009). *See also State v. Roggenkamp*, 153 Wn.2d 614, 625, and note 6, 106 P.3d 196 (2005)("Where the legislature uses certain statutory language in one statute and different language in another, a difference in legislative intent is evidenced") *and State v. Veliz*, 176 Wn.2d 849, 862, 298 P.3d 75, 81 (2013) ("If the legislature had intended the residential provisions in domestic violence protection orders to have the force of parenting plans for the purposes of the custodial interference statute, it would have said so by referring to such orders as parenting plans.")

Here, the corresponding Superior Court Criminal Rule (CrR) uses different terms than CrRLJ 4.7(g)(7). In order to give effect to those differences, this Court must read CrRLJ(g)(7)(ii) to permit dismissal based on misconduct on the part of a third party, such as a complaining witness.

The corresponding superior court rule differs in two significant ways from CrRLJ 4.7(g)(7). First, the superior court rule, CrR 4.7(h)(7),[3] authorizes the court to dismiss the action for discovery abuses that do not rise to the level of willful or grossly negligent violations and do not prejudice the accused as long as those are committed by a party to a case:

> (i) If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with an applicable discovery rule or an order issued pursuant thereto, the court may order such party to permit the discovery of material and information not previously disclosed, grant a continuance, ***dismiss the action*** or enter such other order as it deems just under the circumstances.

CrR 4.7(h)(7)(i) (emphasis added).

[3] That subsection of CrR 4.7(h)(7) reads in full:
(i) If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with an applicable discovery rule or an order issued pursuant thereto, the court may order such party to permit the discovery of material and information not previously disclosed, grant a continuance, dismiss the action or enter such other order as it deems just under the circumstances.
(ii) Willful violation by counsel of an applicable discovery rule or an order issued pursuant thereto may subject counsel to appropriate sanctions by the court.

Second, the superior court rule does not contain any language similar to CrRLJ 4.7(g)(7)(ii), which authorizes a court of limited jurisdiction to dismiss the case for willful or grossly negligent discovery violations that prejudice a defendant without regard to whether the wrongdoer is a party. This court must read the differences between the CrR and the CrRLJ to comport different meanings.

2. The history of CrRLJ 4.7(g)(7)(ii) shows that it applies to non-parties because the CrRLJ Task Force intended the CrRLJs to be different than the CrRs and intended that dismissal be a more easily available remedy for discovery violations in courts of limited jurisdiction.

When the plain language of a court rule is clear, the court need not resort to the legislative history. However, it may do so for support of its plain language analysis. *State v. Barbee*, 187 Wn.2d 375, 390, 386 P.3d 29 (2017); *In re Cruze*, 169 Wn.2d 422, 431, 237 P.3d 274 (2010). The history of CrRLJ 4.7(g)(7) shows that, consistent with the plain language of the rule, the Supreme Court of Washington intended that it allow a dismissal based on third party conduct.

Prior to the adoption of the CrRLJs, the Criminal Rules for Justice Court (JCrR) governed misdemeanor courts in Washington State. The Washington Supreme Court adopted the CrRLJs in 1987 to provide adequate procedures for high-volume misdemeanor courts.

In its 1986 draft of the CrRLJs, the CrRLJ Task Force acknowledged that, although it would attempt to parallel the numbering system and organizational structure of the Superior Court Rules, such rules "could not be imported wholesale into the system for courts of limited jurisdiction." Criminal Rules for Courts of Limited Jurisdiction, Tentative Draft, Washington State Bar Association, May 1986, Introductory Comment, page ii (attached as Appendix A). The Task Force noted the high volume of cases in courts of limited jurisdiction: "these courts have a tremendous volume of cases which preclude some of the more individualized procedures in the superior courts." *Id*. It also said that although the Superior Court Rules would serve as a model, "they would be clarified, streamlined, and simplified as necessary." *Id.*

Before the CrRLJs, JCrR 4.07 addressed discovery in courts of limited jurisdiction. It explicitly allowed sanctions only when a party failed to comply with discovery demands:

> If a party fails to comply within a reasonable time with a written discovery demand the court may order compliance and grant a continuance. The court shall not dismiss a case for violation of this rule unless the violation was willful and intentional.

Washington State Judicial Council, Proposed Criminal Rules for Justice Court, Approved by the Washington Judicial Council, June 16, 1978, pages 40-42 (attached as Appendix B).

In its May 1986 proposal, the CrRLJ task force's comment on proposed CrRLJ 4.7 addressed what is now CrRLJ 4.7(g)(7)(ii) and emphasized the importance of dismissals when willful or grossly negligent discovery violations prejudiced the defendant's right to a fair trial:

> After extensive debate, the task force included a sanction provision not found in the superior court rule. Section (g)(6)(ii) allows the court to dismiss a case for violations of the discovery rule or orders that are 'willful' or a result of 'gross negligence,' if the defendant was prejudiced by the violation. It was argued that rule 8.3(b) would be available to control abuse of discovery, but concerns were raised that the discovery rule itself would be interpreted to contain the exclusive remedies for violations of discovery procedures.

Criminal Rules for Courts of Limited Jurisdiction, Tentative Draft, Washington State Bar Association, May 1986, page 139 (attached as Appendix A).

The CrRLJ Task Force's comments that the CrRLJs would need to be different than the CrRs based in part on the volume in misdemeanor courts, its emphasis on allowing for dismissals based on discovery violations, and its rewriting of JCrR 4.07 to include a section that allowed for dismissal when a discovery violation prejudices a defendant without mentioning who must commit that discovery violation all indicate that the Task Force intended that what is now CrRLJ 4.7(g)(7)(ii) apply to non-parties. It is clear that the Task Force intended that CrRLJ 4.7(g)(7) have a different meaning than the corresponding CrR, which does not allow for

dismissal based on a third party's discovery violation. Additionally, the Task Force recognized the importance of dismissal as an alternative to a constitutionally deficient unfair trial.

3. Authorizing courts of limited jurisdiction to dismiss misdemeanor cases for the misconduct of a non-party properly balances several important interests.

Authorizing courts of limited jurisdiction to dismiss misdemeanor cases for the misconduct of a non-party properly balances the community's interest in the prosecution of misdemeanors with the court's need to control its calendar and the use of its resources and to protect the fairness and integrity of the judicial system.

This Court has recognized that the prosecution of misdemeanors—minor offenses that can significantly impact the accused but carry less severe punishment—requires a different balancing of rights and resources than felony prosecutions. In *Born v. Thompson*, the court addressed the burden of proof required to establish prerequisites for misdemeanor competency restoration. 154 Wn.2d 749, 117 P.3d 1098 (2005). The court noted that the government does not have the same interest in prosecuting those charged with misdemeanors as it does in prosecuting those charged with felonies. *Id* at 756. Due to the relatively low amount of jail time a court can impose for a misdemeanor compared with the significant amount of prison time a felony can trigger, the court found that the government's

interest in prosecution of misdemeanors was less than the accused's liberty interest in avoiding competency restoration. *Id* at 757; *see also Harris v. Charles*, 171 Wn.2d 455, 256 P.3d 328 (2011) (the limited jail sentence available for misdemeanor sentencing justifies denying credit for pretrial electronic home monitoring in misdemeanors even though Washington courts require such credit for felony cases).

In addition to addressing less serious conduct and its consequences, courts of limited jurisdiction preside over a higher volume of cases than superior courts do. In 2017, prosecutors filed 40,012 felonies in Washington's superior courts. By way of comparison, in 2016 prosecutors filed 195,724 misdemeanors in Washington's courts of limited jurisdiction. Washington Courts website, Caseloads of the Courts of Washington (http://www.courts.wa.gov/caseload/ last visited April 13, 2018). Due to the high volume of cases, the public defenders who serve courts of limited jurisdiction have large caseloads. The Standards for Indigent Defense allow felony public defenders to handle 150 felonies a year while misdemeanor defenders can handle 300 to 400 cases per year. SID 3.4.

The CrRLJs, adopted in 1987, were written with the unique interests of courts of limited jurisdiction in mind. The differences between courts of limited jurisdiction and superior courts explain why a court of limited jurisdiction should be able to dismiss a case based on a non-party's

discovery violation while a superior court cannot. Given their high caseloads, public defenders in courts of limited jurisdiction do not have time to chase down willfully uncooperative witnesses who continually defy court orders. Neither do courts of limited jurisdiction have time to address the delays such witnesses cause. A prosecutor who faces dismissal if her witnesses are extremely uncooperative has an incentive to work with the witnesses in such a way as to encourage them to obey court orders. Recalcitrant witnesses will be motivated to comply with court orders and cooperate with the parties if their misconduct can result in dismissal of the charges.

Use of the drastic measures of a material witness warrant or a finding of contempt, either of which would likely involve jailing a witness who disobeys a discovery order, is often disproportionate to the importance of the government securing a misdemeanor conviction. Reading CrRLJ 4.7(g)(7)(ii) as allowing dismissal based on a witness' failure to obey a discovery order would allow judges in courts of limited jurisdiction discretion to weigh the importance of the government's chance to secure a conviction against the use of government resources and impact on a witness's life resulting from jail (due to a material witness warrant or contempt).

Under CrRLJ 4.7(g)(7)(ii), a court "may" dismiss a case based on a third party's willful or grossly negligent violation of a discovery rule or order. Because the rule is permissive, it allows a trial court to balance competing interests before deciding whether to dismiss a case. A court of limited jurisdiction can, therefore, take into account many factors, including the significance of the witness, the nature of the discovery violation, the extent of the prejudice to the defense, and other factors in the case.

B. Moving forward with the trial in this case, absent an opportunity for defense counsel to meaningfully interview the government's key witnesses, would have violated Ms. Stevens' constitutional right to counsel.

An accused person has a constitutional right to the effective assistance of counsel. *State v. A.N.J.*, 168 Wn.2d 91, 96, 225 P.3d 956 (2010); *State v. Jones*, 183 Wn.2d 327, 330, 352 P.3d 776, 777 (2015); *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); U.S. Const. Amends. VI, XIV; Wash. Const. art. I, § 22.

In order to provide constitutionally adequate representation, defense counsel must investigate each case. *A.N.J.*, 168 Wn.2d at 111; *Jones*, 183 Wn. 2d at 339. Such investigation requires a defense attorney to interview

the witnesses against the accused. *Jones*, 183 Wn.2d at 339[4]; *see also* *State v. Burri*, 87 Wn.2d 175, 181, 550 P.2d 507 (1976); *see also* American Bar Association Criminal Justice Standards for the Defense Function, Standard 4-4.3(c) (4th ed. 2015) (defense counsel should seek to interview all witnesses before trial).

Indeed, defense counsel is wholly unable to competently cross-examine the government's witnesses if s/he has not had the opportunity to conduct interviews. This is because a basic tenet of cross-examination is that an attorney should not ask a question to which s/he does not already know the answer. *See* Thomas A. Mauet, *Trial Techniques* 256 (8th Ed. 2010).

Typically, cases addressing violations of the right to counsel involve some failure on the part of the lawyer. *See e.g. A.N.J.*, 168 Wn.2d 91; *Jones*, 183 Wn.2d 327. But an accused person's right to counsel can be violated by the actions of persons other than a defense attorney him/herself. For example, a court can violate the right to counsel by denying a motion to continue necessary to permit defense counsel time to adequately prepare for trial, by denying a motion to withdraw when necessary to avoid a conflict of interest, by failing to inquire into a

[4] The *Jones* court held that defense counsel's failure to interview a witness may be permissible if it is the result of an "informed and reasonable decision." *Jones*, 183 Wn.2d at 340. That limitation on the *Jones* court's analysis of the right to counsel is inapposite in Ms. Stevens's case, in which her defense attorney had made a clear decision *in favor* of interviewing Obert and C.O. and had sought every opportunity to do so.

potential conflict of interest, or by requiring defense counsel to testify at a trial at which s/he is acting as an attorney. *In re V.R.R.*, 134 Wn. App. 573, 586, 141 P.3d 85, 91 (2006); *State v. Aguirre*, 168 Wn.2d 350, 365, 229 P.3d 669, 676 (2010); *State v. Regan*, 143 Wn. App. 419, 429, 177 P.3d 783, 788 (2008); *State v. McDonald*, 143 Wn.2d 506, 22 P.3d 791 (2001); *State v. Sullivan*, 60 Wn.2d 214, 218, 373 P.2d 474, 476 (1962).

Similarly, a prosecutor can violate an accused person's right to counsel, *inter alia*, by amending the Information to add new charges for which defense counsel has had no opportunity to prepare, improperly conducting a special inquiry proceeding that effectively renders alibi witnesses unavailable to the defense for further interviews, or by failing to act with the due diligence necessary to timely provide defense counsel with materials necessary for trial preparation. *See e.g. State v. Michielli*, 132 Wn.2d 229, 240, 937 P.2d 587, 593 (1997); *State v. Burri*, 87 Wn.2d at 180; *State v. Price*, 94 Wn.2d 810, 814, 620 P.2d 994, 996 (1980).

Finally, a third party's conduct can violate the right to counsel by, for example, failing to conduct forensic tests with the due diligence necessary to provide them to defense counsel in a timely manner. *See State v. Woods*, 143 Wn.2d 561, 583, 23 P.3d 1046, 1060 (2001); *State v. Cannon*, 130 Wn.2d 313, 328, 922 P.2d 1293, 1301 (1996).

In sum, defense counsel him/herself need not be ineffective in order for an accused person to be deprived of his/her right to counsel. The fact that Ms. Stevens's attorney did everything he could to secure the opportunity to interview the government's witnesses in this case does not preclude a finding that she was deprived of her right to counsel. Rather, the government's witnesses violated her right to counsel by refusing to submit to meaningful interviews and the prosecutor did so as well by failing to do everything necessary to permit defense counsel to investigate the case.

An accused person is prejudiced by being forced to move forward into a trial with counsel who is unprepared to provide constitutionally adequate representation if "new facts" are interjected into the case as a result. *State v. Salgado-Mendoza*, 189 Wn.2d 420, 432, 403 P.3d 45, 51 (2017) (*citing State v. Price*, 94 Wn.2d 810, 814, 620 P.2d 994 (1980)).[5] In Ms. Stevens's case, defense counsel was unable to interview the alleged victims regarding their supposed injuries, which they claimed resulted from the charges against Ms. Stevens. It is difficult to predict other or additional "new facts" that likely would have been interjected as well;

[5] When a trial actually takes place despite defense counsel's failure or inability to conduct a reasonable investigation, the prejudice standard analyzes whether there is a reasonable probability that that failure or inability affected the outcome of the trial. *See Jones*, 183 Wn.2d at 341 (applying the *Strickland* standard for ineffective assistance of counsel). Because no trial took place in Ms. Stevens's case, that inquiry is inapplicable.

however, the critical evidence relating to the alleged injuries, alone, is sufficient to meet the "new facts" standard.

Ms. Stevens had a constitutional right to be represented by an attorney who had prepared for trial by interviewing the state's witnesses. *A.N.J.*, 168 Wn.2d at 111; *Jones*, 183 Wn. 2d at 339; *Burri*, 87 Wn.2d at 181. Moving forward to trial with a defense attorney who was unable to do so would have violated her rights under the Sixth Amendment and Article I, section 22. *Id.* As a result, this Court must affirm the trial court's dismissal of the charges against Ms. Stevens. *Id.*

C. Under the doctrine of constitutional avoidance, this Court must construe CrRLJ 4.7(g)(7)(ii) as permitting dismissal because to do otherwise would violate the accused's constitutional right to effective assistance of counsel.

In the alternative, in order to avoid this constitutional question, this Court must construe CrRLJ 4.7(g)(7)(ii) in a manner permitting dismissal in cases (like Ms. Stevens') in which the actions of third parties make it impossible for defense counsel to conduct a constitutionally adequate investigation. *See Utter v. Bldg. Indus. Ass'n of Washington*, 182 Wn.2d 398, 434, 341 P.3d 953, 971 (2015) (The Supreme Court construes statutes and rules in a manner that avoids constitutional doubt). Such a construction of the rule would give full effect to the plain language and

legislative history of the rule while also sidestepping significant issues regarding violation of the right to counsel in future cases.

V. CONCLUSION

Washington's discovery rules are designed to protect the right to a fair trial and just resolution of a criminal charge and to ensure the due process rights of the accused. *State v. Yates*, 111 Wash.2d 793, 797, 765 P.2d 291 (1988) (*quoting* Criminal Rules Task Force, Washington Proposed Rules of Criminal Procedure 77 (West Pub'g Co. ed.1971)). "[D]iscovery prior to trial should be as full and free as possible consistent with protections of persons, effective law enforcement, the adversary system, and national security." *Id.* In order for CrRLJ 4.7 to meet these purposes, this Court should read the rule as allowing for dismissal of a case when third parties blatantly violate discovery orders.

Respectfully submitted this 16th day of April, 2018.

Amici Curiae
WASHIGNTON DEFENDER ASSOCIATION
WASHINGTON ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

By s/ Christine Jackson

Christine Jackson, WSBA #17192
Skylar Brett, WSBA #45475
Lauren McLane, WSBA # 40945
Magda Baker, WSBA #30655

APPENDIX A

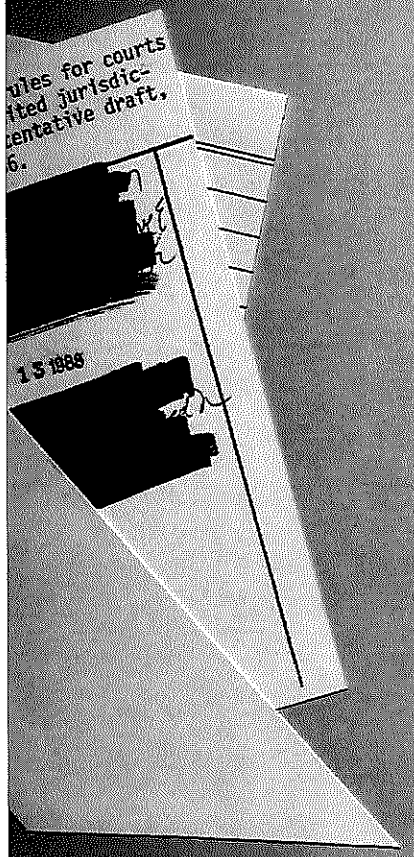
CRIMINAL RULES FOR COURTS OF LIMITED JURISDICTION

Tentative Draft

May 1986

DRAFT
NOT FOR CIRCULATION

Criminal
KFW
517
A4
C75
1986



WASHINGTON STATE BAR ASSOCIATION
505 MADISON ST., SEATTLE, WASHINGTON 98104
(206) 622-6054

Dear Interested Association Member:

Enclosed is a copy of the "tentative draft" of revised criminal rules proposed for use in district and municipal courts. These proposed rules have been prepared by the Washington State Bar Association's Special Task Force on the Revision of the Justice Court Criminal Rules.

Later this year, the new set of rules will be presented to the Board of Governors of the Washington State Bar Association for for its review, and thereafter submitted to the state Supreme Court. Once published as proposed rules, there will be several months for interested persons to comment directly to the Court.

At this stage, however, the rules should be considered a tentative draft only. Moreover, the commentary prepared by staff, while reviewed individually by task force members, has not been subjected to the full debate and formal approval that occurs at a task force meeting. The task force will meet again after members of your association have had an opportunity to review and comment on the draft. We anticipate additional revisions based on the association's critique before submitting the new set of rules to the Board of Governors.

Thank you for your interest in this important effort. We look forward to receiving your comments and suggestions, and will give them most careful consideration.

Please address your correspondence to the attention of Steven Rosen, c/o CLE Department, Washington State Bar Association, at the above address by Monday, June 16, 1986.

Very truly yours,

Harold J. Petrie, Chair
Task Force on Revision of the Justice Court Criminal Rules

Introductory Comment

During its 1984-1985 cyclical review, the Court Rules and Procedures Committee of the Washington State Bar Association selected the Justice Court Criminal Rules as one of the sets for its annual review. In approximately December 1984, the Committee decided that it lacked sufficient time and expertise to revise the JCrR's. These rules had been developed originally in 1963 and had been subject to piecemeal amendments since then. Several of the rules were obsolete, others unconstitutional under current decisional law, and many contained procedures that were no longer feasible. Moreover, the JCrR's were written prior to the enactment of the Justice Court Traffic Infraction Rules (JTIR) and the Rules for Appeal of Decisions of Courts of Limited Jurisdiction (RALJ). Provisions in these latter sets of rules needed to be accommodated in the new CrRLJ's.

The Court Rules and Procedures Committee therefore passed a resolution requesting the Board of Governors of the Bar Association to appoint a special task force composed of knowledgeable representatives of the various groups that work on a day-to-day basis within the system embraced by courts of limited jurisdiction. The resolution further requested that the task force have a longer time than normally permitted under GR 9 to complete the project. The Board of Governors considered this resolution at its meeting on January 11-12, 1985 and agreed to appoint a special task force to review and rewrite the Justice Court Criminal Rules in their entirety. A number of associations were invited to nominate members for appointment to the task force; as a result, the task force is composed of the following member-representatives:

Judge Robert C. Bibb Snohomish County Superior Court	Superior Court Judges Association
Mr. Seth Dawson Snohomish County Prosecutor	Washington Association of Prosecuting Attorneys
Ms. Deborah Dowd	Washington State Bar Association
Judge Ronald Kessler Seattle Municipal Court	District and Municipal Court Judges Association
Judge Darrell Phillipson Aukeen District Court	District and Municipal Court Judges Association
Ms. Linda Sullivan Whatcom County Public Defender's Office	Washington Defender Association

Ms. Karen Wick Evergreen District Court	Washington State Association for Court Administration
Judge Richard Wrenn Spokane County District Court	District and Municipal Court Judges Association

The Honorable Harold J. Petrie agreed to serve as chair of the task force. Mr. Larry McKeeman, chief criminal deputy, participated when Mr. Dawson was unable to attend. Ms. Dowd, in addition to serving as a member of the task force, acted as staff attorney until December 1985. Beginning in January 1986, Mr. Steven Rosen has been attorney for the task force.

The task force quickly agreed that the entire set of Justice Court Criminal Rules required a complete rewriting. In general, the task force decided to follow existing provisions of the Superior Court Criminal Rules, including most of the pending amendments published by the Supreme Court for comment during the term of the task force's work. The task force also decided, insofar as possible, to parallel the numbering system and organizational structure of the superior court rules. A major reason for these decisions was the desire to eliminate as much disparity and confusion between procedures in the two levels of trial court as feasible.

Members of the task force agreed, however, that the Superior Court Criminal Rules could not be imported wholesale into the system for courts of limited jurisdiction. First, these courts have a tremendous volume of cases which preclude some of the more individualized procedures in the superior courts. Second, the courts of limited jurisdiction have a much greater number of pro se defendants, who go through the system without ever obtaining a lawyer. Third, there is a wide variation in geography, population, and staffing levels within the district and municipal courts throughout the state; the new rules had to take these differences into account.

The task force decided not to bow to the requirements imposed by computer systems. Instead, it opted to write rules of general application with allowances for local jurisdictions to make variations if the computers presented a problem. In addition, although the superior court criminal rules were to serve as a model and be incorporated whenever appropriate, they would be clarified, streamlined, and simplified as necessary.

The task force made several general terminology decisions. First, the term "lawyer" is used, rather than "attorney" or "counsel." Second, the term "citation and notice" is used instead of "citation" to refer to that document. Third, recognizing that municipalities are represented by city attorneys, the task force elected to use the term "prosecuting authority" rather than "prosecuting attorney." Finally, both in drafting new rules or incorporating selected superior court rules, the task force has attempted to "degenderize" the language used in the rules.

A comment has been prepared for each rule. If the rule is identical to a corresponding rule in the superior court set, no effort is made to extensively analyze or explain the origin of the rule. The focus of these comments is on the intent of the task force with respect to current Washington law and on the reasons for departures from the existing justice court or superior court criminal rules. For a more complete analysis of the superior court rules, see Orland and Dowd, 4A Washington Practice (3rd ed. 1983).

The rules do not purport to codify constitutional criminal law. Although several of the rules do contain a phrase such as "subject to constitutional limitations," the application of a rule may be subject to constitutional limitations or restrictions which are not defined in the rule.

RULE 1.1 SCOPE

Comment

This rule parallels CrR 1.1, with appropriate changes in terminology. It replaces JCrR 1.01. See also Justice Court Administrative Rules (JAR), rule J2.

A procedural statute is superseded only to the extent it is inconsistent or conflicts with a rule. The statute may still be given effect to the extent that it complements the rule.

RULE 1.2 PURPOSE AND CONSTRUCTION

These rules are intended to provide for the just determination of every criminal proceeding. They shall be construed to secure simplicity in procedure, fairness in administration, effective justice, and the elimination of unjustifiable expense and delay.

RULE 1.2 PURPOSE AND CONSTRUCTION

Comment

This rule is identical to CrR 1.2. It replaces JCrR 1.02. See also JAR rule J2.

The purpose of the task force in redrafting the JCrR's was to reform and modernize the rules of criminal procedure in the courts of limited jurisdiction. In electing to incorporate many provisions of the superior court criminal rules, the task force also intended to integrate and make consistent much of the procedure in the different levels of courts. Case law interpreting the superior court rules may thus be looked to, in many instances, as a guide in construing the proposed new CrRLJ.

RULE 1.3 EFFECT

Except as otherwise provided elsewhere in these rules, on their effective date:

(a) Any acts done before the effective date in any proceedings then pending or any action taken in any proceeding pending under rules of procedure in effect prior to the effective date of these rules and any constitutional right are not impaired by these rules.

(b) These rules also apply to any proceedings in court then pending or thereafter commenced regardless of when the proceedings were commenced, except to the extent that in the opinion of the court, the former procedure should continue to be made applicable in a particular case in the interest of justice or because of infeasibility of application of the procedures of these rules.

RULE 4.7 DISCOVERY

Comment

This rule substitutes a formal discovery process for the limited discovery provisions contained in JCrR 3.10(a) and JCrR 3.12(b). The rule should eliminate the practice of using the bill of particulars provision in JCrR 2.04(b) as a discovery device. Although CrR 4.7 served as a model for this rule, the task force made a number of changes to create a more streamlined procedure specifically designed for courts of limited jurisdiction.

The task force decided not to propose a statewide omnibus hearing procedure, as used in superior court, because it is unnecessary in many cases. Because courts of limited jurisdiction are authorized to develop local court rules that are not in conflict with the state rules (see GR 7), local jurisdictions may institute an omnibus hearing procedure if they deem it necessary.

Section (a). As there is no provision for an omnibus hearing, the task force created a separate time limit for compliance with discovery demands in section (a)(2). Unless the court orders otherwise, disclosure must be made within 15 days of arraignment or 15 days of receipt of the demand, whichever is later. The material and information subject to disclosure, enumerated in section (a)(1), combines provisions of CrR 4.7(a)(1)(i)-(vi), (a)(2)(i)-(iii), and (c)(1)-(3). The requirement that grand jury minutes be disclosed, as provided in CrR 4.7(a)(1)(iii), was deleted. Sections (a)(3) and (a)(4) are identical to CrR 4.7(a)(3) and (4).

Section (b). This section contains, in (b)(2), the same time requirements for compliance with discovery as are imposed on the prosecution. The task force combined in section (b)(1) the provisions of CrR 4.7(b)(1), the disclosure obligations of the prosecutor regarding tangible objects and expert witnesses, and the provisions of CrR 4.7(b)(2)(ix), (xi), (xiii), and (xiv). CrR 4.7(b)(2)(xii), concerning an alibi defense, was eliminated, as the task force decided it was adequately covered by other provisions of the draft rule. Compare CrR 4.5(h), "MOTION BY PLAINTIFF."

Section (c). This section preserves the limitations imposed by constitutional law presently contained in CrR 4.7(b)(2)(i)-(viii).

Section (d). Section (d) is identical to CrR 4.7(d).

Section (e). This section is similar to CrR 4.7(e), except that the provision has been made available to either party by elimination of the restrictive language "to the preparation of the defense."

Section (f). Section (f) incorporates CrR 4.7(f). The task force did not include CrR 4.7(g) because the provisions contained in that section can be found elsewhere in the proposed rule.

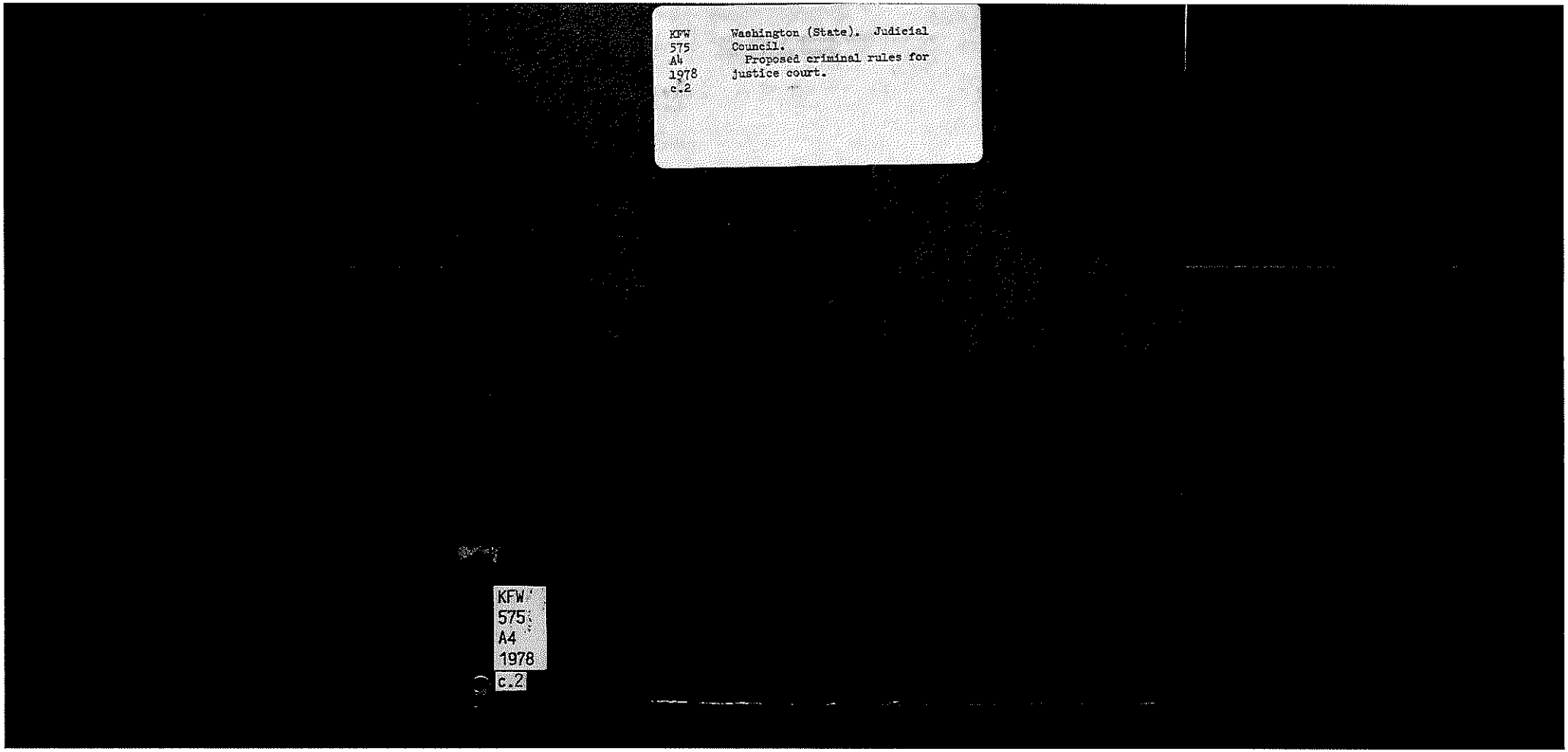
Section (g). This section is based on CrR 4.7(h). The task force included the amendment proposed by the Court Rules and Procedures Committee, which would eliminate the "exclusive custody" requirement set forth in CrR 4.7(h)(3). This provision will be reevaluated after the Supreme Court takes action on the proposed amendment.

After extensive debate, the task force included a sanction provision not found in the superior court rule. Section (g)(6)(ii) allows the court to dismiss a case for violations of the discovery rule or orders that are "willful" or a result of "gross negligence," if the defendant was prejudiced by the violation. It was argued that rule 8.3(b) would be available to control abuse of discovery, but concerns were raised that the discovery rule itself would be interpreted to contain the exclusive remedies for violations of discovery procedures.

APPENDIX B

PROPOSED CRIMINAL RULES FOR JUSTICE COURT

Approved by the
WASHINGTON JUDICIAL COUNCIL
June 16, 1978


KFW
575
A4
1978
c.2

KFW
575
A4
1978
c.2
Washington (State). Judicial
Council.
Proposed criminal rules for
justice court.

The differences between this rule and the corresponding superior court rule generally reflect stylistic and organizational preferences, and not major substantive variations. However, this rule, unlike CrR 4.4, does not distinguish between prosecution and defense motions for severance. Compare proposed CrR 4.4(a)(b) and (c).

Sections (a) and (b). These provisions are intended to promote a party's moving to sever early in the proceedings.

RULE 4.05 [Reserved]

RULE 4.06 DEPOSITIONS

(a) When Taken. Upon a showing that a prospective witness may be unable to attend or prevented from attending a trial or hearing or if a witness refuses to discuss the case with either counsel and that his testimony is material and that it is necessary to take his deposition in order to prevent a failure of justice, the court at any time after the filing of a complaint may upon motion of a party and notice to the parties order that his testimony be taken by deposition and that any designated books, papers, documents or tangible objects, not privileged, be produced at the same time and place.

(b) Notice of Taking. The party at whose instance a deposition is to be taken shall give to every other party reasonable written notice of the time and place for taking the deposition. The notice shall state the name and address of each person to be examined. On motion of a party upon whom the notice is served, the court for cause shown may extend or shorten the time and may change the place of taking.

(c) How Taken. A deposition shall be taken in the manner provided in civil actions in superior court. No deposition shall be used in evidence against any defendant who has not had notice of and an opportunity to participate in or be present at the taking thereof.

(d) Use. At the trial or upon any hearing, a part or all of a deposition so far as otherwise admissible under the Rules of Evidence may be used if it appears: that the witness is dead; or that the witness is unavailable, unless it appears that his unavailability was procured by the party offering the deposition; or that the witness is unable to attend or testify because of sickness or infirmity; or that the party offering the deposition has been unable to procure the attendance of the witness by subpoena. Any deposition may also be used by any party for the purpose of contradicting or impeaching the testimony of the deponent as a witness.

(e) Objections to Admissibility. Objections to receiving in evidence a deposition or part thereof may be made as provided in civil actions in superior court.

Current Law

None.

Comment

Identical to CrR 4.6.

RULE 4.07 DISCOVERY

(a) Initiation. Either party may initiate discovery by a written demand upon the opposing party. The demand shall be in the form of a legal pleading, served upon the opposing party or counsel of record. As a minimum, the demand shall include, if known:

(1) the defendant's name;

(2) the court and case number;

(3) the trial date;

(4) the citing officer, personnel number, and agency; and

(5) the crime charged and date of violation.

(b) Matters Subject to Disclosure. Matters which are subject to disclosure under this rule shall include:

(1) The names and addresses of persons who may be called as witnesses;

(2) Copies of any written statements of the defendant, and the substance of any oral statements;

(3) Copies of any written witness statements;

(4) Copies of any expert reports; and

(5) Any information which tends to negate or mitigate the defendant's guilt.

(c) Matters Not Subject to Disclosure. Matters which are not subject to disclosure under this rule shall include:

(1) Personal memoranda or notes; and

(2) Memoranda, reports and records to the extent that they contain opinions, theories or conclusions of a party.

(d) Compliance with Discovery. Discovery requirements are completed by providing them to the opposing party or counsel.

(e) Sanctions for Noncompliance. If a party fails to comply within a reasonable time with a written discovery demand the court may order compliance and grant a continuance. The court shall not dismiss a case for violation of this rule unless the violation was willful and intentional.

(f) Applicability. This rule shall apply to all criminal and traffic proceedings for crimes punishable by loss of liberty.

Current Law

JCrR 3.10(a).

Comment

The task force adopted a policy of full pretrial disclosures for both prosecution and defense. However, serious practical and administrative problems were foreseen for the implementation of discovery in view of the high volume of cases, the fact that prosecution evidence may not be in the control of the prosecutor prior to trial and the expense and inconvenience of making materials available.

RULE 4.08 SUBPOENAS

(a) Who May Issue; Form; Service. Both the prosecution and the defendant are entitled to subpoena such witnesses as are necessary. Subpoenas may be issued by

the judicial officer or the clerk of the court. The prosecutor or defense counsel may issue a subpoena and shall forthwith file a copy with the court. The subpoena shall be substantially in the form prescribed for superior court, as provided in CR 45. The court may direct service of the subpoena by the sheriff of any county or any peace officer of any municipality in the state in which such witness may be, or the subpoena may be served as provided in CR 45.

(b) Materiality of Testimony. When so required by the court, the applicant for subpoena, whether in person or by counsel, shall show to the satisfaction of the court, the materiality of the testimony which is expected to be obtained from such witness.

(c) Compelling Attendance of Witnesses. On motion of a party, a judicial officer may issue a warrant to compel the attendance of any witness failing to appear in response to a properly issued and served subpoena. The judicial officer may require that the moving party show, to the satisfaction of the court, that the testimony of the absent witness is material. Warrants issued pursuant to this rule shall be served and returned in the same manner as a warrant issued pursuant to Rule 2.02.

(d) Production of Documentary Evidence. A subpoena may also command the person to whom it is directed to produce the books, papers, documents, or tangible things designated therein; but the court, upon motion made promptly and in any event at or before the time specified in the subpoena for compliance therewith, may (1) quash or modify the subpoena if it is unreasonable and oppressive or (2) condition denial of the motion upon the advancement by the person in whose behalf the subpoena is issued of the reasonable cost of producing the books, papers, documents, or tangible things.

Current Law

JCrR 3.10(b) through (d), 3.12; RCW 10.04.090; RCW 12.16.010, .020, .030, .040, .060; RCW 35.20.260.

Comment

Supersedes RCW 12.16.010, .020. Supersedes in part RCW 12.16.030, .040, .060; RCW 35.20.260.

Section (a). One purpose of requiring counsel to file a copy of any subpoenas issued is to keep the court informed of the number of witnesses to be called. This should facilitate calendar planning.

WASHINGTON DEFENDER ASSOCIATION

April 16, 2018 - 3:29 PM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	93812-1
Appellate Court Case Title:	City of Kirkland v. Hope Stevens
Superior Court Case Number:	15-1-01772-8

The following documents have been uploaded:

- 938121_Briefs_20180416143152SC406591_3127.pdf
  This File Contains:
  Briefs - Amicus Curiae
  The Original File Name was Filed- Kirkland v Stevens amici April 16 2018.pdf
- 938121_Cert_of_Service_20180416143152SC406591_9219.pdf
  This File Contains:
  Certificate of Service
  The Original File Name was CERTIFICATE OF E_SERVICE KIrkland v Stevens.pdf
- 938121_Motion_20180416143152SC406591_7447.pdf
  This File Contains:
  Motion 1 - Amicus Curiae Brief
  The Original File Name was Motion for Leave to File Amicus in Kirkland v Stevens.pdf

A copy of the uploaded files will be sent to:

- Christine.Jackson@kingcounty.gov
- lobsenz@carneylaw.com
- magda@defensenet.org
- mclanel@uw.edu
- mosman@moberlyandroberts.com
- skylarbrettlawoffice@gmail.com
- todd@ahmlawyers.com

Comments:

Sender Name: Magda Baker - Email: magda@defensenet.org
Address:
110 PREFONTAINE PL S STE 610
SEATTLE, WA, 98104-2626
Phone: 206-623-4321

Note: The Filing Id is 20180416143152SC406591