

CHAPTER 4

Pre-Trial Release and Discovery

I. Introduction

This chapter presents information on the statutes, case law, and docket management practices that permit a court, before trial, to protect all parties, including alleged sexual offense victim, the defendant, and the public. This chapter also includes discussion of pre-trial release procedures and discovery issues that arise in sexual offense cases.

Within existing rules and procedures, the court should take steps before trial to keep alleged sexual offense victims safe and enable them to engage in positive collaboration with law enforcement, legal advocates, and the prosecutor's office. Only 16-36 percent of all sexual assaults are reported to the police, and fear of law enforcement disbelief is a consistent barrier to victim reporting.¹ With such low reporting rates it is important for key players in the criminal justice system to recognize that they can make significant impacts on an alleged victim's experience. Being treated with respect is often cited as helping sexual offense victims to continue with the criminal justice process.²

Note: This chapter is intended to be a supplement to matters of general criminal procedure covered in criminal bench books. This chapter does not cover issues particular to juvenile offenders. Information relating to juvenile offenders can be found in Chapter 8 of this bench guide.

II. Pre-Trial Release

A. Scope

In Washington the law, including court rules, governing personal recognizance, bail, conditions of release, and related matters is the same in sexual offense cases as it is in other criminal cases.

Among other legal resources, court rules pertaining to criminal cases in Washington are covered in the *Washington State Judges Bench Book, Criminal Procedure, Superior Court* and the *Washington State Judges Bench Book, Criminal Procedure, Courts of Limited Jurisdiction* published by the Washington Administrative Office of the Courts. These bench books cover in detail matters such as:

- Constitutional provisions, statutes, and court rules
- Respective rights of defendant and state
- Personal recognizance

¹ Debra Patterson and Rebecca Campbell, "Why Rape Survivors Participate in the Criminal Justice System," issue 38 *Journal of Community Psychology* (2)191-205, (2010)

² Id. at 200

- Bail
- Conditions of release
- Factors to be considered by court
- Delay of release
- Release in capital cases
- Violation of conditions
- Failure to appear

Washington court rules can be found at http://www.courts.wa.gov/court_rules/. The discussion in this chapter focuses on the special considerations that should be taken into account in sexual offense cases. Attention is also given to no-contact orders and other special procedures that are available to assist victims.

B. Victim Rights and Safety Concerns

1. Court responsibility

A sexual offense can shatter a victim’s sense of personal safety and victims are terrified of retaliation. This fear is real, not only because many victims can experience repeated victimization (a particular risk where perpetrators are former intimate partners) but also because victims, post-offense, experience higher levels of fear in general.³

Trial judges are empowered by both federal and state law to take steps that can mitigate such fear. For instance the federal Crime Victims’ Rights Act (CVRA) grants crime victims some rights including, “[t]he right to be reasonably protected from the accused.”⁴ The Washington State Crime Victims’ Rights Act similarly provides statutory protection to victims, stating they have the right “[t]o receive protection from harm and threats of harm arising out of cooperation with law enforcement and prosecution efforts, and to be provided with information as to the level of protection available.”⁵ This language suggests that both the state and federal governments have assumed some duty to protect victims from further harm and that judges have a responsibility to carry out this duty.⁶

Under Washington law, judges are specifically empowered to employ pre-trial release conditions and no contact orders that can ease a victim’s fears.

2. Advisement and enforcement of release order conditions

Release orders with special conditions are most effective if the defendant knows clearly what the conditions are and understands that violations will result in detention and/or

³ Patricia A. Resick, Lois J. Veronen, Karen S. Calhoun, Dean G. Kilpatrick, et al, “Assessment of Fear Reactions in Sexual Assault Victims: A Factor Analytic Study of The Veronen-Kilpatrick Modified Fear Survey” 8 *Behavioral Assessment* (3) 271-283 (1986)

⁴ 18 U.S.C. § 3771(a)(1) (2006)

⁵ RCW 7.69.030(4) <http://apps.leg.wa.gov/rw/default.aspx?cite=7.69.030>

⁶ Mary Margaret Gianni, “Redeeming an Empty Promise: Procedural Justice, the Crime Victims Rights Act, and the Victims’ Right to be Reasonably Protected from the Accused”, 78 *Tenn. L. Rev.* 47, 48 (2010)

other sanctions. The court should ensure, by making appropriate inquiries of counsel and/or the defendant and victims, that the defendant has been advised of and understands his/her responsibilities under the order, and that victims understand how to report violations of the order. If victims are not present in court when a release order is entered, the court should confirm with the prosecutor, a victim advocate or a law enforcement representative that the victims will be promptly and thoroughly advised of the order and its conditions and promptly notified if the defendant is released from custody. When possible, victims should be given advance notice of pre-trial release hearings so that they can be present.

To promote victim safety and offender accountability, swift enforcement of release order violations is important, particularly in sex offense cases. The court should encourage victims to report violations quickly. The court should establish published rules and procedures that permit prosecutors and court personnel to expedite violation hearings.

Additionally, Appendix C [Advancing Procedural Justice on Your Protection Order Docket] in Chapter 9 of this bench guide includes information about the positive impact procedural justice practices have on the defendant's compliance with court orders.

C. Court Rules

1. Personal recognizance release

In Washington, release without bail is required unless the court makes findings consistent with the court rules. The Washington Supreme Court has adopted identical court rules for courts of general and limited jurisdiction concerning pre-trial release. CrR 3.2 and CrRLJ 3.2, require release all defendants, other than those charged with a capital offense, on their personal recognizance unless the court makes specific findings. Bail may be set only if the court finds that (a) release on personal recognizance will not reasonably assure the defendant's appearance as required, or (b) there is a likely substantial danger that the defendant will commit a violent crime or seek to intimidate a witness or otherwise interfere with the administration of justice. Court Rule 3.2 sets out non-exclusive factors for the court's consideration.⁷

2. Relevant factors relating to finding of likely failure to appear

If the court finds that a release on personal recognizance will not reasonably assure the defendant's appearance as required by the court, it is required to consider the following nonexclusive factors in determining the appropriate conditions of release:

- a. The defendant's history of response to court orders and legal process;
- b. The defendant's employment status and history, participation in education, training, counseling or treatment, community volunteer work, participation in

⁷ CrR 3.2

http://www.courts.wa.gov/court_rules/?fa=court_rules.display&group=sup&set=CrR&ruleid=supCrR3.2

school or cultural activities, or receipt of financial assistance from the government;

- c. The defendant's family ties and relationships;
- d. The defendant's reputation, character and mental condition;
- e. The length of the defendant's residence in the community;
- f. The defendant's criminal record;
- g. The willingness of responsible members of the community to vouch for the defendant's reliability and assist the defendant in complying with conditions of release;
- h. The nature of the charge, if relevant to the risk of nonappearance;
- i. Any other factors indicating the defendant's ties to the community.⁸

3. Least restrictive conditions of release required by a finding of likely failure to appear

Upon a finding of likely failure to appear, the court must impose upon the defendant the least restrictive of the following conditions that will reasonably assure appearance as required:

- a. Place the defendant in the custody of a designated person or organization;
- b. Place restrictions on the defendant's travel, association, or place of abode;
- c. Require the defendant to execute a non-secured or secured bond;
- d. Require the defendant to return to custody during specified hours or electronic monitoring;
- e. Impose any other condition except detention deemed reasonably necessary to assure appearance as required.⁹

4. Relevant factors relating to a finding of substantial danger

If the court finds that there is a substantial danger that the defendant will commit a violent crime or interfere with the administration of justice, it is required to consider the following nonexclusive factors in determining the appropriate conditions of release:

⁸ CrR 3.2(c)

⁹ CrR 3.2(b)

- a. The defendant's criminal record;
- b. The willingness of responsible members of the community to vouch for the defendant's reliability and assist the defendant in complying with the conditions of release;
- c. The nature of the charge;
- d. The defendant's reputation, character and mental condition;
- e. The defendant's past record of threats to victims or witnesses or interference with witnesses or the administration of justice;
- f. Whether or not there is evidence of present threats or intimidation directed to witnesses;
- g. The defendant's past record of committing offenses while on pretrial release, probation or parole;
- h. The defendant's past record of use of, or threatened use of deadly weapons or firearms, especially to victims or witnesses.¹⁰

Of these factors, the nature of the charge, a defendant's past record of threats to the victim, and other intimidation toward the victim, may be particularly relevant in sexual assault cases.

5. Conditions of release permitted by a finding of substantial danger

Upon a finding of substantial danger, the court may impose one or more of the following nonexclusive conditions of release:

- a. Prohibit approaching or communicating with particular persons or class of persons;
- b. Prohibit presence in designated geographic areas or premises;
- c. Prohibit the defendant from possessing any dangerous weapons or firearms, engaging in described activities or possessing or consuming any intoxicating liquors or drugs not prescribed;
- d. Require regular reporting and supervision;
- e. Prohibit any criminal law violations;

¹⁰ CrR 3.2(e)

- f. Require the posting of a bond or deposit of cash, if the least restrictive alternative that will reasonably assure community safety;
- g. Place in the custody of a designated person or organization;
- h. Place restrictions on the travel, association, or place of abode;
- i. Require the return to custody during specified hours or electronic monitoring;
or
- j. Impose any other condition except detention to assure noninterference with the administration of justice and community safety.¹¹

6. No contact as a condition of release

In sexual offense cases, the court should order, as a condition of release, no contact with the victim or other witnesses as authorized in CrR 3.2(d). It is particularly important to include a no-contact provision in the release order if the victim and alleged assailant know each other or if the victim expresses fear of the alleged perpetrator, because these situations present an increased likelihood of victim-defendant contact and detrimental outcomes for victims. In considering a no-contact order the court should also consider who, in addition to the victim, may need protection from contact, such as witnesses who are the victim’s family members or friends.

The court should consider, in addition to CrR 3.2 no-contact orders, other protection orders that may also be available that differ in scope or means of enforcement. For instance, in CrR 3.2 release orders courts cannot impose protections for non-witness family members of the victim, whereas they are able to do so in other no-contact orders.

Enforcement mechanisms are also different. For example, violation of a CrR 3.2 no-contact order may result in revocation of release but does not constitute a separate crime, whereas violation of a RCW 9A.46.040 criminal harassment protection order is a gross misdemeanor. Because of the lower standard of proof required for revoking conditional release (the clear and convincing standard), additional protection is afforded the victim when both types of “no-contact” orders are entered.

D. Criminal No-Contact Orders

In addition to no-contact provisions contained in a CrR 3.2 pre-trial release order, the court may impose separate no-contact orders *sua sponte* under chapter 9A.46 RCW,¹² Washington’s harassment statute, or under chapter 7.90 RCW,¹³ Washington’s Sexual

¹¹ CrR 3.2(d)

¹² RCW 9A.46.040 <http://apps.leg.wa.gov/rcw/default.aspx?cite=9A.46.040>

¹³ RCW 7.90.150 <http://apps.leg.wa.gov/rcw/default.aspx?cite=7.90.150>

Assault Protection Order Act. The court should order no-contact under these statutes during arraignment or when a person charged with a sex offense is released from custody.¹⁴

1. Harassment statute - chapter 9A.46 RCW

Chapter 9A.46 RCW defines “harassment” as including many of Washington’s defined sex crimes under chapter 9A.44 RCW (including first, second, and third degree rape, indecent liberties, child rape, and child molestation)¹⁵. The statute cites the likelihood of repeated harassment directed at victims, and permits courts to require defendants to:

(a) stay away from the home, school, business, or place of employment of the victim or victims of the alleged offense or other locations, as shall be specifically named by the court order;

(b) refrain from contacting, intimidating, threatening, or otherwise interfering with the victim or victims of the alleged offense and such other persons, including but not limited to members of the family or household of the victim, as shall be specifically named in the court order.¹⁶

Note: This statute allows courts to assign protection to persons other than the victim(s) and witnesses who may need protection.

2. Sexual Assault Protection Order Act – chapter 7.90 RCW

RCW 7.90.150 allows a court to prohibit contact between the defendant and alleged victims when the defendant has been charged with or arrested for a sex offense defined in RCW 9.94A.030. Under this statute the no-contact order may be issued telephonically but must be issued in writing as soon as possible.¹⁷ Criminal no-contact orders entered pursuant to this statute:

- a. may be issued prior to pre-trial release or arraignment;
- b. must include a specific legend as set forth in the statute;
- c. must be provided by copy to the victim at no charge;
- d. may require electronic monitoring as a condition of release;
- e. must, if ordered as part of arraignment proceedings, be entered into the state’s Criminal Intelligence Information System; and

¹⁴ Id.

¹⁵ RCW 9A.46.060 <http://app.leg.wa.gov/RCW/default.aspx?cite=9A.46.060>

¹⁶ RCW 9A.46.040(1)(a)-(b)

¹⁷ RCW 7.90.150(1)(c) <http://apps.leg.wa.gov/rcw/default.aspx?cite=7.90.150>

- f. terminate if the defendant is acquitted or the charges are dismissed but will remain in place for up to two years after the end of a sentence if the defendant is found guilty

Judges have been awarded considerable discretion under these statutes to provide important protections to victims and others affected by the alleged criminal conduct.

E. Civil Protection Orders

The court (either on the record or through clearly established clerk or victim advocate protocols) should advise a victim of sexual offense that civil protection orders may be available to them even if a criminal no-contact order is entered.

For example, criminal no-contact orders are valid only while the court has jurisdiction over the defendant, and, consequently, if charges are dismissed, a criminal no-contact order is no longer in effect and victims may find themselves without continuing protection. Moreover, criminal no-contact orders do not offer the same types of restrictions as some civil orders. For instance, the civil sexual assault protection order statute allows courts to order an assailant to transfer schools, an option not specified in other statutes.

Civil protection orders are available to victims under the sexual assault protection order statute, chapter 7.90 RCW, the domestic violence statute, chapter 26.50 RCW, the anti-harassment protection order statute, chapter 10.34 RCW, and the vulnerable adult protection order statute, chapter 74.34 RCW.

Note: Chapter 9 of this bench guide includes detailed information about civil sexual assault protection orders.

III. Discovery Issues in Sexual Offense Cases

A. General

CrR 4.7 establishes the ground rules for discovery in criminal cases. For more in-depth analysis of CrR 4.7 and other general discovery rules see the Washington Practice Series on Criminal Practice and Procedure.¹⁸

Although the criminal discovery rule applies uniformly to all criminal cases, including sexual offense cases, some discovery issues may arise with particular frequency in sexual offense cases. In sexual offense cases, for example, it is more common than in most other criminal cases for there to be little or no corroborating evidence to support a victim's testimony. Consequently, in sexual offense cases the focus is often on the credibility of the victim as much or more than on the defendant. Defense efforts to discover evidence that defendants claim is relevant to victim credibility may conflict with protections provided by

¹⁸ 12 *Wash. Prac.*, Criminal Practice and Procedure Chapter 13 (3d ed)

Washington’s rape shield law¹⁹ or with the confidentiality of privileged communications. It is important for the court to determine that there is a legal basis for discovery that is allowed in sexual offense cases, and that it is not allowed as a tactic to harass, intimidate, or fish for information.

B. Specific Issues

1. Nondisclosure of victims’ addresses

In those cases in which the defendant may not know the victim’s address, if the court finds that the victim may be at risk from disclosure or if the victim expresses fear of disclosure the court should consider including in a protective order a prohibition of disclosure of the victim’s home address to the defendant.²⁰

Some sexual offense victims may be participants in the Washington state address confidentiality for victims program.²¹ Under this statute, information for participants in the address confidentiality program may only be released if the court finds probable cause that the information is “legally necessary (1) In the course of a criminal investigation or prosecution or (2) To prevent immediate risk to a minor and meet the statutory requirements of the Washington child welfare system.”²²

2. Access to witnesses

It is misconduct for counsel to instruct a witness not to speak to opposing counsel or to an opposing party’s investigator or to instruct a witness not to grant the opposing party an interview unless that counsel is present.²³ However, counsel may inform witnesses that they may choose whether to provide an interview and that they have the right to determine who shall be present at such an interview.²⁴ If a victim or witness has retained counsel, interviews will be coordinated through counsel. The court should take steps to ensure that a sexual offense victim’s right to have a support person present during interviews is protected.²⁵

3. Psychiatric examinations of victims

¹⁹ RCW 9A.44.020. <http://apps.leg.wa.gov/rcw/default.aspx?cite=9A.44.020>

²⁰ CrR 4.7(h)(4)

http://www.courts.wa.gov/court_rules/?fa=court_rules.display&group=sup&set=CrR&ruleid=supCrR4.07; *State v. Mannhalt*, 68 Wn. App. 757, 766-67, 845 P.2d 1023 (1992) (keeping witness’ address secret did not violate the defendant’s right to confrontation)

²¹ Chapter 40.24 RCW <http://apps.leg.wa.gov/rcw/default.aspx?cite=40.24>

²² RCW 40.24.075

²³ CrR 4.7(h)(1)

²⁴ *State v. Hofstetter*, 75 Wn. App. 390, 402, 878 P.2d 474 (1994)

²⁵ RCW 7.69.030 (Rights of victims, survivors, and witnesses)

<http://app.leg.wa.gov/rcw/default.aspx?cite=7.69.030>; RCW 7.69A.030 (Rights of child victims and witnesses) <http://app.leg.wa.gov/RCW/default.aspx?cite=7.69A.030>; RCW 70.125.060 (Victims of Sexual Assault Act) <http://apps.leg.wa.gov/rcw/default.aspx?cite=70.125.060>

Psychiatric examinations of sexual offense victims may be ordered only upon a showing of a “compelling reason” for doing so. The substantial nature of the “compelling reason” standard is illustrated by the Court of Appeals decision in *State v. Weisberg*,²⁶ in which the court upheld the trial court’s denial of a motion for psychiatric examination of the victim. After an *in camera* review of the victim’s mental history, the trial court in *Weisberg* concluded that psychiatric evaluation of a mentally retarded rape victim would be of little value in establishing or impeaching the victim’s credibility.²⁷

4. Polygraph testing of victims

Law enforcement officers, attorneys and “other governmental officials” are barred from asking or requiring victims of sexual offenses to undergo polygraph testing as a condition of case investigation, charging, or prosecution.²⁸

5. Information not subject to disclosure

Attorney work product and the identity of confidential informants are not subject to disclosure.²⁹

6. Information identifying minor victims of sexual assault

Although information related to the identity of child victims of sexual assault may be released to law enforcement, prosecutors, judges, defense attorneys, or private or governmental agencies that provide services to the child victim of sexual assault, such information is otherwise confidential and may not be released to the press or public.³⁰ The court must therefore exercise care to file any documentation related to a child victim’s name, address, location, or photographs under seal and caution counsel accordingly.

C. Privileges and Protective Orders Related to Discovery

1. Confidential information regarding victims

a. Background

Due to the paucity of physical evidence in some cases of sexual assault,³¹ there may be a heightened focus on the credibility of the victim. This often results in defendants seeking access to personal, confidential, and even privileged information regarding victims and witnesses, including counseling records. The law regarding privilege and rape shield is well-settled in statute and case law, as discussed below and in Chapter 6 [Evidence] of this guide.

²⁶ 65 Wn. App. 721, 829 P.2d 252 (1992)

²⁷ Id. at 727

²⁸ RCW 10.58.038 <http://apps.leg.wa.gov/rcw/default.aspx?cite=10.58.038>

²⁹ CrR 4.7(f)

http://www.courts.wa.gov/court_rules/?fa=court_rules.display&group=sup&set=CrR&ruleid=supCrR4.07

³⁰ RCW 10.97.130 <http://apps.leg.wa.gov/rcw/default.aspx?cite=10.97.130>

³¹ See Chapter 1 of this guide [Understanding Sexual Violence] for a more detailed discussion on this subject.

b. *Richie* analysis

Confidential or medical records of a victim may be disclosed only upon appropriate finding by the court following an *in camera* review. Washington case law requires that a defendant, in order to seek release of confidential records through an *in camera* review, must "advance some factual predicate which makes it reasonably likely" that the records contain information material to the defense.³² To make the necessary showing of materiality, the defendant must show more than that the records have some value to the defense or would lead to the discovery of other evidence, and *in camera* review should be denied if the defendant's showing is based on "considerable speculation and little factual basis or foundation" or merely shows that the records "might lead to other evidence or may contain information critical to the defense...."³³

The precedent for allowing the release of confidential records to a defendant absent a victim's consent is found in federal case law. The seminal case concerning the confidentiality of a victim's records is *Pennsylvania v. Richie*,³⁴ in which the Supreme Court held that when those records are sufficiently material and favorable to the defense, their release may be justified, and the court noted that materiality exists 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.³⁵

c. Sexual assault advocates and rape crisis center records

Communications between a sexual offense victim and a sexual assault advocates are privileged. Sexual assault advocates may not be compelled to testify about any conversations between themselves and a victim without the victim's consent. The only statutory exception is when "failure to disclose is likely to result in a clear, imminent risk of serious physical injury or death of the victim or another person."³⁶

The term "sexual assault advocate" refers to any employee or volunteer from a community-based sexual assault program or victim assistance program that provides information, medical or legal advocacy, counseling, or other support to victims of sexual assault, designated by the victim to accompany the victim to a health care facility, police or prosecution interviews or court proceedings.³⁷

The Washington Victims of Sexual Assault Act³⁸ provides that records maintained by a community sexual assault program may be provided to defense counsel only if:

- i. the defendant files a pretrial motion requesting the records;

³² *State v Blackwell*, 120 Wn.2d 822, 830, 845 P.2d 1017 (1993)

³³ *State v. Diemel*, 81 Wn. App. 464, 469, 914 P.2d 779 (1996)

³⁴ 480 U.S. 39, 107 S. Ct. 989, 94 L.Ed.2d 40 (1987)

³⁵ *Id.* at 57

³⁶ RCW 5.60.060(7) <http://apps.leg.wa.gov/rcw/default.aspx?cite=5.60.060>

³⁷ *Id.*

³⁸ Chapter 70.125 RCW <http://apps.leg.wa.gov/rcw/default.aspx?cite=70.125>

- ii. the motion is supported by affidavits explaining the basis for the request;
- iii. the court, by *in camera* review, determines that the records are relevant, and their probative value outweighs the victim's privacy interest, taking into account the trauma releasing the records to the defendant would cause the victim; and
- iv. the court enters an order stating what portions of the records are discoverable, including the basis for the court's findings.³⁹

D. Rape Shield Law

Washington's rape shield law prevents certain information about a victim's past sexual history, marital history, and divorce history from being admitted in evidence. Although this law applies to the admissibility of evidence rather than whether such evidence is discoverable, it is noted here because the defense often seeks such information during pretrial discovery.

In considering discovery motions for a victim's past sexual, marital or divorce history, the court should consider the likelihood of emotional harm to the victim by the requirement to answer questions or provide information about their past sexual history. For further discussion of the rape shield law, see Section III of Chapter 3, Defenses to Sexual Offenses, and Section II of Chapter 6, Evidence, in this bench guide.

³⁹ RCW 70.125.065 <http://apps.leg.wa.gov/rcw/default.aspx?cite=70.125.065>