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NO. 93812-1

IN THE SUPREME COURT OF WASHINGTON  
(Court of Appeals No. 74300-7-I)

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CITY OF KIRKLAND,

Respondent,

v.

HOPE A. STEVENS,

Petitioner.

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CITY'S RESPONSE TO BRIEF OF AMICUS CURIAE  
WASHINGTON DEFENDER ASSOCIATION and WASHINGTON  
ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

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Melissa J. Osman, WSBA # 52678  
Assistant Prosecuting Attorney  
*Attorney for Respondent*

MOBERLY & ROBERTS, PLLC  
12040 98<sup>th</sup> Ave NE Ste 101  
Kirkland, WA 98034  
Telephone: (425)-284-2362  
Fax: (425) 284-1205

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A. INTRODUCTION

Respondent, City of Kirkland, submits responsive briefing to the policy arguments presented by amicus curiae Washington Defender Association (WDA) and Washington Association of Criminal Defense Lawyers (WACDL). Amici in this case argue that this Court should adopt an interpretation of CrRLJ 4.7(g)(7)(ii) that is entirely separate from the rule's plain language as well as its current practical effect. To accept amici's argument would severely and irreparably damage the ability of prosecutors practicing in courts of limited jurisdiction to justly process important cases.

The following is a brief response to select points included in WDA and WACDL's amicus brief. Points not specifically addressed herein are not conceded by the City of Kirkland, but are adequately addressed in the City's previous briefing. Respondent respectfully requests this Court affirm the King County Superior Court's ruling on the RALJ appeal in this matter, remanding the issue to the trial court.

B. ARGUMENT

1. POLICY ARGUMENTS PRESENTED BY AMICUS CURIAE ARE INSUFFICIENT TO OVERRIDE CURRENT WASHINGTON CASE LAW AND THE PRINCIPLES OF STATUTORY INTERPRETATION

Court rules are interpreted using principles of statutory construction. *State v. Billie*, 132 Wn.2d 484, 492, 939 P.2d 691 (1997). The “primary goal of statutory interpretation” is to “ascertain and give effect to the legislature’s intent and purpose.” *State v. Williams*, 158 Wn.2d 904, 908, 148 P.3d 993 (2006). Statutory language must be viewed in light of the statute as a whole, along with relevant drafting history. *Id.*

A. The plain language and legislative history of CrRLJ 4.7(g)(7)(ii) is clear that non-party conduct does not justify dismissal as a discovery sanction.

WDA and WACDL argue that this Court should conclude that CrRLJ 4.7(g)(7)(ii) authorizes outright dismissal of a case when any individual involved fails to cooperate with the defense investigation, regardless of whether they are a party to the case. Amicus Brief at 6. Despite noting this Court’s instruction in *State v. Delgado* that appellate courts may not supplant the meaning of the legislature by “add[ing] words or clauses to an unambiguous statute where the legislature has not chosen to include that language,” Amici advocate that the Court assign an entirely unmentioned discovery obligation to non-party witnesses in order to

facilitate the dismissal of misdemeanor cases. Amicus Brief at 6 (citing *Delgado*, 148 Wn.2d at 727).

Criminal Rule for Courts of Limited Jurisdiction 4.7 assigns discovery obligations to each party and addresses applicable sanctions for discovery violations. CrRLJ 4.7(a) addresses the prosecutor's obligations to provide defense counsel with information supporting the case and any exculpatory information within their actual "knowledge, possession, or control." Likewise, CrRLJ 4.7(b) requires that the defendant provide the prosecutor with information including, but not limited to, witnesses intended to be called at trial, expert witness credentials and reports, and any evidence the defendant intends to present at trial. CrRLJ 4.7(b)(2) requires defendants must present such discoverable materials to the prosecution 14 days prior to trial:

With respect to information in the knowledge of other persons, CrRLJ 4.7(d) requires only that the prosecutor "attempt to cause such material or information to be made available to the defendant." The rule contemplates that these attempts may not be successful but does not provide for dismissal in that circumstance. Instead, when third parties refuse to provide information sought by defense, "the court shall issue

suitable subpoenas or orders to cause such material to be made available to the defendant.” CrRLJ 4.7(d).

CrRLJ 4.7(g)(1) also addresses discovery of information held by “persons, other than the defendant”. The rule provides that “neither the lawyers for the parties nor other prosecution or defense personnel” may impede communication or investigation by opposing lawyers by advising potential witnesses to refrain from providing relevant material and information. CrRLJ 4.7(g)(1). CrRLJ 4.7(g)(2) further imposes upon “a party” the continuing duty to disclose newly discovered information. CrRLJ 4.7(g)(4) and (6) permit the court to order that specified disclosure be restricted or deferred, to order excision of undiscoverable information from otherwise discoverable material, and to conduct in camera review of discovery materials in dispute. Thus, CrRLJ 4.7 clearly identifies the duties of the prosecutor, defendant, and trial court with respect to discovery, but nowhere does the rule impose any obligation on non-party witnesses.

CrRLJ 4.7(g)(7) governs sanctions for discovery violations. Its first subsection provides that the trial court may order a party to permit discovery of previously undisclosed material, grant a continuance, or enter another order that is just under the circumstances if “a *party* has failed to

comply with an applicable discovery rule.” CrRLJ 4.7(g)(7)(i)(emphasis added). CrRLJ 4.7(g)(7)(ii) authorizes the trial court to dismiss the case where “willful violation” or “gross negligence” with regard to discovery rules prejudices the defendant. Finally, the third subsection provides that a “*lawyer’s* willful violation of an applicable discovery rule or an order issued pursuant thereto” may subject the attorney to sanctions. CrRLJ 4.7(g)(7)(iii)(emphasis added).

Unlike CrRLJ 4.7(i) and (iii), CrRLJ 4.7(g)(7)(ii) does not explicitly identify who must commit a discovery violation for the trial court to order dismissal. Absent such language, the Court should harmonize the language in the second subsection with the rule as a whole. CrRLJ 4.7(g)(7)(i) specifically references a “party” to the case when noting the trial court’s available options to address discovery issues. Because no different actor is specified in the second subsection, the Court should conclude that the section applies to the same actor specified in the first subsection: “a party.” As subsection (iii) demonstrates, the drafters understood how to change the focus of the rule when they intended to do so. Without explicit language doing that in subsection (ii), this Court should not conclude the drafters of the rule intended that the

noncooperation of those who are not even subject to the rules of discovery would justify the extraordinary remedy of dismissal.

Further, the dismissal in this case arose from the victims' refusal to attend a second deposition. But it is CrRLJ 4.6 that governs depositions, not CrRLJ 4.7. Under that rule, the court may order a deposition when "a witness refuses to discuss the case with either lawyer" and "his or her testimony is material." CrRLJ 4.6(a). The deposition rule does not address penalties for noncompliance, does not refer to dismissal, and does not refer to sanctions provided under CrRLJ 4.7(g)(7). Not surprisingly, CrRLJ 4.7 does not refer to depositions or to the rule governing them.

In addition to the rule's plain language, the Court can refer to drafting history and available comments by drafters to determine the intent of the rule. *State v. Barbee*, 187 Wn.2d 375, 390, 386 P.3d 29 (2017). The task force assigned to draft the Criminal Rules for Courts of Limited Jurisdiction discussed the "extensive debate" over the subsection at issue in this case. Amicus Brief, Appendix A. The task force notes the desire to reconcile the language of CrRLJ 8.3(b) and the intent that CrRLJ 4.7 contain "remedies for violations of discovery procedures." Amicus Brief, Appendix A at 139. The task force comments make no reference to non-party conduct. While the task force resisted wholesale importation of the

superior court rules, it did not divert so far from those rules as to assign any discovery obligation to non-party witnesses, nor did it explain its addition of subsection (ii) as a means to facilitate dismissal for non-party conduct. Indeed, it appears the task force intended to *limit* the district court's authority to dismiss for discovery violations.

Under CrR 4.7(h)(7)(i), a superior court has four options to address discovery violations: order discovery, grant a continuance, "enter such other order as it deems just," or dismiss the action. Under CrRLJ 4.7(g)(7)(i), however, a district court only has the first three of those options. Instead, a district court's power to dismiss is separated into subsection (ii), which precludes dismissal absent a "willful violation or gross negligence" and resulting prejudice to the defendant. The drafter's apparent intent was to *narrow* a district court's explicit power to dismiss by requiring more egregious misconduct and prejudice. It does not logically follow that the drafters would simultaneously *expand* the district court's power to dismiss by making the conduct of those not even assigned discovery obligations subject to the most extreme sanction.

With no indication in the drafting history or comments of drafters to support such a substantial change to discovery practice, Stevens' and

Amici's interpretation of CrRLJ 4.7(g)(7)(ii) to permit dismissal based on non-party conduct is unpersuasive.

B. Witness conduct is not attributable to the parties with regard to discovery obligations.

Amici argue that CrRLJ 4.7(g)(7)(ii) authorizes trial courts to dismiss a case in light of "any discovery violation as long as it is willful or grossly negligent and prejudices the defendant." Amicus Brief at 6. By asserting that the rule should be interpreted to apply to victims and witnesses, Amici advocate that non-party witnesses be tasked with discovery obligations not otherwise contemplated in Washington's criminal rules. This is inconsistent with appellate court observations that witnesses are not stripped of their autonomy based on their involvement in a criminal case, nor is a criminal defendant denied his constitutional protections when that autonomy is exercised.

In *State v. Hofstetter*, Division II of the Washington State Court of Appeals surveyed case law from across the country, including the Ninth Circuit. The court articulated the national consensus that "witnesses do not 'belong' to either party" in a criminal case. 75 Wn. App. 390, 396-98, 878 P.2d 474, *rev. denied*, 185 Wn.2d 1012 (1994). The court highlighted the Ninth Circuit's conclusion that a "defendant's right of access to a witness exists co-equally with the witnesses' right to refuse to say

anything.” *Id.* at 397 (quoting *United States v. Black*, 767 F.2d 1334 (9<sup>th</sup> Cir. 1985)). Thus, the *Hofstetter* court recognized that “no right of a defendant is violated when a potential witness freely chooses not to talk; a witness may of his own free will refuse to be interviewed by either the prosecution or the defense” and “the defendant’s right of access is not violated when a witness chooses voluntarily not to be interviewed.” *Id.*

Additionally, this Court has clarified that by submitting to an interview, witnesses do not waive their ability to exercise independence; nor is the defendant entitled to any and all information the witness may have. *See, e.g., State v. Gonzalez*, 110 Wn.2d 738 (1988)(finding that a rape victim was not required to provide defense counsel with the names of past sexual partners when the defendant failed to show that the information would be material to his defense); *see also, State v. Knutson*, 121 Wn.2d 766, P.2d 617 (1993)(analyzing defendant demands to interview witnesses under the Due Process Clause and finding that no violation occurs unless there is a reasonable probability that the evidence in question was admissible and would affect the result of trial). In *Gonzalez*, this Court endorsed the United States Supreme Court’s conclusion that “a defendant cannot establish a violation of his constitutional right to compulsory process merely by showing that he was

deprived of certain testimony. He must at least make some plausible showing of how the testimony would have been both material and favorable to his defense.” 110 Wn.2d 738, 750, 757 P.2d 925 (1988) (quoting *United States v. Valenzuela-Bernall*, 458 U.S. 858, 867, 102 S.Ct. 3440, 73 L.Ed.2d 1193 (1982)). Materiality is also viewed in light of the evidence’s likely admissibility at trial. *State v. Knutson*, 121 Wn.2d 766, 772-3, 854 P.2d 617 (1993). Notably, Petitioner in this case has never articulated why the confidential medical information she seeks is material to her defense nor established its admissibility were it presented at trial.

Washington case law acknowledges the autonomy of witnesses and properly refuses to deny civilian witnesses their ability to choose whether to submit to questioning. Neither the drafting history of CrRLJ 4.7(g)(7)(ii), nor its plain language supports the conclusion that the drafters intended that discovery obligations be imposed upon independent witnesses such that their independent choice not to cooperate subjects the State to the extreme remedy of dismissal of a criminal prosecution.

## 2. AMICI’S PROPOSED BROAD-SWEEPING POLICY CHANGES TO DISCOVERY RULES ARE CONTRARY TO WASHINGTON’S INTEREST IN PROSECUTING CRIME

Amici asserts that construing discovery rules to permit the extreme remedy of dismissal for victim/witness noncooperation is good public

policy because misdemeanors are less serious than felonies, because public defenders practicing in courts of limited jurisdiction do not have time to chase uncooperative witnesses, and because such a rule would motivate witnesses to cooperate lest their misconduct result in dismissal. This argument reveals a fundamental misunderstanding of the separate and often differing interests of the government and victims and witnesses in prosecuting offenses, particularly with respect to domestic violence.

Courts of limited jurisdiction processed 194,174 misdemeanor cases in Washington in 2017<sup>1</sup>. According to the Washington State Institute for Public Policy, roughly 20% of all misdemeanor cases filed each year from 2001 – 2012 involved domestic violence. Washington State Institute for Public Policy, *Recidivism Trends of Domestic Violence Offenders in Washington State*, pg. 3, Doc. No. 13-08-1201 (2013). The Washington State Legislature identified domestic violence as being of particular importance as early as 1984, when it enacted the “Domestic Violence Prevention Act.” Laws of 1984, ch. 263. The legislation included a new provision that mandated that officers make an arrest when they have

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<sup>1</sup> See Caseloads of the Courts of Washington, Courts of Limited Jurisdiction Cases Filed - 2017 Annual Report (available at <http://www.courts.wa.gov/caseload/?fa=caseload.showReport&level=d&freq=a&tab=CourtLevel&fileID=rpt01> (last visited May 9, 2018)).

sufficient cause to believe that a suspect has assaulted a member of their family or household within the preceding four hours, regardless of the victim's preferences. Laws of 1984, ch. 263, § 19.

The fact that misdemeanor convictions carry less significant consequences for the offender than felony convictions is not a good reason to make misdemeanor prosecutions easier to dismiss. Much criminal conduct subject to misdemeanor prosecution, including domestic violence and driving under the influence, is extremely serious. For example, the legislature noted the "unacceptable levels" of property loss, injury, and death caused by impaired drivers. Laws of 2004, ch. 68, § 1. Indeed, Washington lawmakers have repeatedly emphasized the importance of misdemeanor offenses by making repeated misdemeanor convictions the basis for support recidivist felony charges and enhancements.<sup>1</sup>

Amici argue that CrRLJ 4.7(g)(7)(ii) stands without restriction as to who may cause dismissal as a sanction for discovery violations and

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<sup>1</sup> See, e.g., RCW 46.61.502(6)(a) (felony DUD); RCW 9A.36.041(3) (felony fourth degree assault DV); RCW 9.41.040(2)(a)(i) (unlawful possession of a firearm in the second degree predicated on assault in the fourth degree, coercion, stalking, reckless endangerment, criminal trespass in the first degree, or violation of the provisions of numerous court orders, when the crimes were committed by one family or household member against another); RCW 9.68A.090(2) (felony communications with a minor for immoral purposes).

encourages the Court to hold that the unilateral action of any non-party, regardless of their relationship to the case, may justify dismissal of a criminal prosecution. Such a reading of CrRLJ 4.7(g)(7)(ii) unreasonably expands the scope of actors who can violate discovery rules and stands in opposition to the current language, legislative history, and current practice associated with the rule.<sup>1</sup>

The traditional interpretation of CrRLJ 4.7(g)(7)(ii) to apply only to parties is especially important to domestic violence cases in Washington. The legislature has previously made clear that discretion to prosecute domestic violence cases does not rest with the victims themselves. See, e.g., RCW 10.22.010(4) (compromise of misdemeanor prohibited when the offense was a crime of domestic violence). Victims of domestic violence may elect to not participate in defense interviews for a number of reasons, including manipulation by abusers to whom they are still attached, financial dependence on the defendant, and fear of physical

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<sup>1</sup> See, e.g., 32 Wash. Prac., Wash. DUI Practice Manual § 29:6 (2017-2018 ed.) (explaining that discovery rules in courts of limited jurisdiction provide sanctions when “a party” has failed to comply, and “further condition the court’s power to dismiss if it is determined that the failure to comply was both the result of willful violation or gross negligence, and the defendant was prejudiced”).

harm to themselves or family members as a result of participating. It is by now well known that “victims of domestic violence often attempt to placate their abusers in an effort to avoid repeated violence, and often minimize the degree of violence when discussing it with others.” *State v. Grant*, 83 Wn. App. 98, 107, 920 P.2d 609 (1996). It is not uncommon for domestic violence prosecutions to proceed in the absence of the victim, and, at times, against the victim’s express wishes. To rule that a victim electing not to participate in a defense interview or not to answer all questions presented will result in outright dismissal will give perpetrators of domestic violence a new tool to exploit in an effort to avoid conviction.

This is not to say that there is no remedy for witness noncooperation. In addition to permitting defense counsel to cross-examine recalcitrant witnesses about their refusal to cooperate with the defense investigation, courts may find a witness in contempt pursuant to RCW 7.21.010 or issue a material witness warrant under CrRLJ 4.10. Amici regard such measures “drastic” and “disproportionate to the importance of the government securing a misdemeanor conviction.” Amicus Brief at 13. No discovery violation remedy is as drastic as the “extraordinary” remedy of outright dismissal, “to which the court should resort only in truly egregious cases of mismanagement or misconduct.” *State v. Wilson*, 149 Wn.2d 1, 9, 65 P.3d 657 (2003) (interpreting CrR

8.3). Witness noncooperation need not stand unchecked, but witnesses cannot reasonably be held to the standards of the parties to a criminal case as far as discovery under CrRLJ 4.7(g)(7)(ii).

### 3. THIS CASE PRESENTS NO CONSTITUTIONAL ISSUE

Amici contends that this Court must construe CrRLJ 4.7(g)(7)(ii) to permit dismissal where victim/witness recalcitrance interferes with the defense investigation because a contrary interpretation would violate a defendant's Sixth Amendment right to effective counsel. This novel constitutional argument is raised for the first and only time in Amici's brief to this Court. Neither party has articulated any Sixth Amendment issue in any briefing to date. Neither the trial court, nor the RALJ court, nor the Court of Appeals commissioner, nor the commissioner of this Court has ever addressed the issue. There was no constitutional issue raised in Stevens' original or supplemental motions for discretionary review. Accordingly, the Sixth Amendment arguments in Amici's brief are outside the scope of review. RAP 13.7(b). The fact that the issue is raised only by Amici is further reason to decline to reach the issue. *See, e.g., City of Seattle v. Evans*, 184 Wn.2d 856, 861 n.5, 366 P.3d 906 (2015) ("This Court will not address arguments raised only by amicus.") (internal quotation omitted). Even if this Court is inclined to address Amici's Sixth Amendment argument, it should find the claim to be

without merit. Contrary to Amici's argument, defense counsel is not constitutionally ineffective when unable to interview uncooperative witnesses.

A criminal defendant is constitutionally guaranteed the right to effective legal counsel when accused of a crime. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052 (1984). While counsel must be able to evaluate the State's evidence, this Court noted in 2010 that "no binding opinion of this court has held an investigation is required" of defense counsel. *State v. A.N.J.*, 168 Wn.2d 91, 96, 225 P.3d 956 (2010).

Persuasive authority from the Fifth Circuit demonstrates that efforts by defense counsel to interview witnesses being unsuccessful does not infringe upon the defendant's right to effective legal representation:

There was also no ineffective assistance in [the attorney's] failure to persist with attempts to interview the victim and Tallman after they refused to talk to her. *See Ward v. Whitley*, 21 F.3d 1355, 1362 (5<sup>th</sup> Cir. 1994) (failure to interview potential witnesses reasonable where witnesses were uncooperative in past efforts to elicit information); *United States v. Grimes*, 426 F.2d 706, 708 (5<sup>th</sup> Cir. 1970) (no ineffective assistance in refusal to subpoena witness where witness refused to meet with attorney to discuss case); *Snell v. Lockhart*, 791 F. Supp. 1367, 1377 (E.D. Ark. 1992) (counsel's failure to interview state's key witness not ineffective assistance where witness refused to speak to counsel); *Neal v. Grammer*, 769 F. Supp. 1523, 1528 (D. Neb. 1991) (counsel not ineffective for failing to interview codefendant where codefendant refused to speak with counsel); *U.S. v. Vargas*, 871 F. Supp. 623, 624 (SDNY 1994) (counsel not ineffective for failure to interview

informants where there was no indication informants were willing to talk to defense).

*Fast Horse v. Weber*, 598 N.W.2d 539, 543-4 (S.D. 1999).

Because a witness does not “belong” to either party, defense counsel is rightfully as exempt from court sanction as a result of non-party conduct. By the same analysis, the government should not be subject to the extreme sanction of dismissal as a result of the noncooperation of victims and witnesses over which the State has no control.

Amici cite both *Jones* and *A.N.J.* as prior opinions of this Court finding ineffective assistance of counsel after a failure to interview prosecution witnesses. Both cases are distinguishable on that point. In *Jones*, trial counsel entirely failed to address, investigate, and interview a prosecution witness and could offer no strategic decision explaining the lack of investigation. 183 Wn.2d at 330. In *A.N.J.*, trial counsel attempted contact with the two complaining witnesses in a child molestation case and, when initial efforts were unsuccessful, he failed to follow up. 168 Wn.2d at 96. In both of those cases, the Court properly ruled that trial counsel failed to meet the minimum threshold established in *Strickland* as effective legal counsel.

The facts of the case before the Court are easily distinguishable. Here, counsel for the Petitioner conducted a ninety-minute deposition of

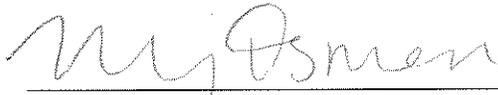
each victim. See Appendix A at 26:25- 27:1. The deposition covered the facts of the assault and ensuing police investigation; the victims only declined to answer questions pertaining to medical treatment at the time of and since the incident. *Id.* at 27:2-6; 27:8-10; 28:1-2. When the victims refused to answer some of his questions, counsel sought and obtained a court order for a second deposition, for which the victims failed to appear. When compared to the total lack of investigation by counsel in *Jones* and lack of follow-up in *A.N.J.*, counsel for the Petitioner cannot be said to have rendered ineffective assistance simply because the victims declined to answer a limited number of questions about sensitive, protected information.

### C. CONCLUSION

The amicus brief presented by WDA and WACDL argues that a just reading of CrRLJ 4.7(g)(7)(ii) creates the expansive rule that any non-party involved in a case is subject to the same discovery obligations, and same ability to invoke dismissal, as a criminal defendant, defense attorney, or prosecutor. The suggested interpretation lacks a basis in the plain language of the rule, expressed intent of the drafters, and current case law. Further, an expansion of the interpretation of CrRLJ 4.7(g)(7)(ii) to include non-parties would severely hinder the ability of

prosecutors and defense counsel alike to manage cases when neither side has ownership over non-parties and cannot interfere with their individual choice to participate. As such, Respondent respectfully requests that this Court interpret CrRLJ 4.7(g)(7)(ii) to apply to the parties to a case, not to non-party conduct, and affirm the RALJ judgment.

DATED this 16th day of May, 2018..



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Melissa J. Osman, WSBA #52678  
Assistant Prosecuting Attorney  
*Attorney for Respondent, City of Kirkland*

# APPENDIX A

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KIRKLAND MUNICIPAL COURT

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CITY OF KIRKLAND,	)	
	)	
Plaintiff,	)	No. 38384
	)	
vs.	)	
	)	
HOPE A. STEVENS,	)	
	)	
Defendant.	)	

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VERBATIM REPORT OF PROCEEDINGS  
FROM ELECTRONIC RECORD  
MOTION PROCEEDINGS  
DECEMBER 30, 2014

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APPEARANCES:

For the City:	TAMMY McELYEA LACEY N. OFFUTT Attorney at Law
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For the Defendant:	TODD MAYBROWN Attorney at Law
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Before:	THE HONORABLE MICHAEL J. LAMBO
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Prepared by:	Linda A. Owen 425-466-8543
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4 THE COURT: All right. Counsel, did we want to take  
5 Ms. Stevens first, or did you have some other matters you'd  
6 like to take out of order?

7 MS. OFFUTT: Yes, your Honor, we are prepared with the  
8 Stevens case. For the record, Lacey Offutt on behalf of  
9 the City. This is cause number 38384.

10 THE COURT: All right. Counsel, good afternoon.

11 MR. MAYBROWN: Good afternoon, your Honor.

12 THE COURT: All right. Well, I've read all of the  
13 briefing. This is your motion, Mr. Maybrown, so I'll let  
14 you go ahead and start.

15 MR. MAYBROWN: Thank you, your Honor. We filed two  
16 declarations that I prepared, both under oath, and an  
17 initial declaration and then a supplemental declaration.  
18 The City has responded, but they haven't filed any  
19 declarations or anything that disputes the facts that we've  
20 claimed, so I'm going to assume for purposes of the motion  
21 that the City agrees with all the facts that are stated in  
22 our motion. They're all true, but I think that that's the  
23 fairway to proceed, since they haven't rebutted or  
24 suggested that any of the facts are anything but accurate.

25 I do think I need to give a little background, because

1 this has been quite a moving target for us. We were -- the  
2 incident was from June 2014. We've been trying to prepare  
3 the case for trial since then. We wanted to go to trial in  
4 November. We talked about it at the initial hearing.  
5 Unfortunately, that became impossible because the City's  
6 witnesses refused to cooperate, would not participate in  
7 interviews. We came to court, we had a hearing, I think on  
8 November 4th. The court granted our order -- or motion for  
9 depositions.

10 Promptly, within a day or two, I said we need to get  
11 these depositions scheduled. They need to go in -- I think  
12 I said no later than November 20th, because we need to  
13 prepare the case after these interviews so we can do some  
14 follow-up investigation and go to trial.

15 I told the court at the time of the last hearing that we  
16 were reluctantly agreeing to continue the case because we  
17 needed to but that we were very firm that we needed the  
18 case to be resolved in January. That was our hope and that  
19 was our goal.

20 What happened after we submitted our information? What  
21 did we discover was that depositions didn't go as  
22 scheduled, December 2nd. We all thought there were going  
23 to be depositions. The witnesses at the last minute make  
24 what I consider to be a very bogus objection and don't show  
25 up. We file a motion to dismiss after that. The witnesses

1 contact us through the prosecutors and say, oh, now we'll  
2 appear but we can't do it until December 19th, right before  
3 the holiday.

4 At that point the court had already scheduled a motion,  
5 but I thought I needed to at least go forward and see  
6 what's going to happen. We went forward with the  
7 depositions, and to my dismay, it was, from the outset, a  
8 terrible experience. I mean right from the beginning, the  
9 witnesses are refusing to answer my questions when they're  
10 very relevant to the case. Their attorney is saying that  
11 my questions are outside the scope, as if the attorney gets  
12 to decide what the scope of the proper deposition is. I  
13 move forward for a few minutes, and I finally said this is  
14 just not tenable. This is not a fair way to prepare a  
15 case.

16 I actually tried to call the court, since we were both  
17 together. The prosecutors were both present. I learned  
18 that the judge was not available. You were not in the  
19 building. So I came back on the record and reluctantly  
20 said that I would proceed under protest because we couldn't  
21 reach the court to help us move the case forward.

22 I got no assistance from the City at all. They never  
23 tried to advance the ball, never tried to speak with the  
24 lawyer or the witnesses and ask them to answer questions.  
25 And the thing that's so hard about this is that these

1 witnesses met with the police not once, but twice, and  
2 answered all their questions. These witnesses met with the  
3 prosecutors and answered all their questions. The  
4 prosecutor said I'm not allowed to be present when they  
5 were meeting with the witnesses, even though I had asked  
6 for an opportunity. I asked that it be recorded. I've  
7 received no discovery, nothing, about those interviews.

8 When the depositions continued, I learned some things  
9 about the incident. I learned that their testimony  
10 completely changed from what they had told the police, that  
11 they claimed the police reports were false. I never had  
12 any idea or expectation that would happen, and then it went  
13 on and on from there with them refusing to provide any of  
14 the background information I needed but answering specific  
15 questions about the day of the incident.

16 The problems we face now is these delays have all been  
17 caused by the City's witnesses and we're backed up against  
18 a trial date again. The questions that I needed answers to  
19 they flatly refused to answer. A few examples, I hear from  
20 the witnesses, including C.O., that he was on medication at  
21 the time of the deposition and the time of the incident.  
22 Will he tell me what it was? No. I ask him about his  
23 change of story. He says he has memory difficulties  
24 because he had a traumatic brain injury. He claims it was  
25 caused during the incident. Will he tell me anything about

1 it? No. I find out that he was recently in a 14-day  
2 hospitalization. He says it was because of the incident.  
3 I ask them to explain. They refuse. They won't provide  
4 any of that information.

5 And there seems to be an incredible double standard. I  
6 have no indication that they refused to answer any of the  
7 questions that the City had put to them, or the police, but  
8 whenever I'm asking questions that are clearly relevant to  
9 the information in the case, they won't answer.

10 I also find out that they destroyed important evidence  
11 that would have been apparent to everybody from the  
12 beginning that we needed, and how that happened, when that  
13 happened, why that happened, we have no way of knowing, and  
14 we don't know that it happened before or after they met  
15 with the prosecutors, because the prosecutors have flatly  
16 refused to give me any discovery. I pointed out in my  
17 motion that under the Criminal Rules 4.7(1)(i)(a), these  
18 are statements of witnesses, they need to be produced. We  
19 should have gotten them before the depositions. And, in  
20 fact, we now know that they're clearly also Brady  
21 information because if the witnesses were changing their  
22 stories when they met with the prosecutors, I needed to  
23 know that. If they decided to change their stories only  
24 now, we needed to know that either way. It should have  
25 been produced and I should have gotten it before the

1 depositions.

2 The only objection I've heard is from the prosecutors.  
3 They say it's work product. In my pleading you see that  
4 there's a case, State v. Garcia, that says notes of a  
5 prosecutor are not work product if they're the statements  
6 of a witness. They have to be turned over. If the City  
7 chose not to record those interviews for strategic reasons  
8 or otherwise, that doesn't matter. Their notes are still  
9 discoverable. We get the summary of the statements under  
10 the rule.

11 And also, the thing that's -- that strikes me is you  
12 would think in a situation like this, the prosecutors would  
13 want to help. They would try to facilitate getting the  
14 information available to the defense so we can properly  
15 move forward, but I've gotten no assistance at all.

16 Now, the legal standards for the court, I actually think  
17 this is a 4.7 issue more than it's an 8.3(b) issue, and  
18 there clearly have been discovery violations, and I agree  
19 that dismissal is an extraordinary remedy, but this is an  
20 extraordinary type of case and situation. I've never faced  
21 anything like this before. The only fair remedy when the  
22 witnesses have so highjacked the proceedings I think is --  
23 would be for a dismissal. When they've destroyed and  
24 hidden evidence, the only fair remedy would be dismissal.  
25 And when the City's prosecutors won't give you statements

1 of these key witnesses, even though we're just a few weeks  
2 before trial, and they wouldn't give them to me before the  
3 depositions, the only remedy would be dismissal.

4 Now, there is a case also about suppressing the  
5 testimony, State v. Hutchinson, and that's a very  
6 interesting case. It was a claim of diminished capacity,  
7 and the defendant refused to answer questions about the  
8 incident when the prosecutors asked him to because under  
9 the rules, the defendant has to submit to an examination  
10 and answer questions if there's that type of defense. The  
11 trial court said if the witness is refusing to answer those  
12 questions, the defense can't put on the expert. The expert  
13 witness can't testify, because it would be unfair. This is  
14 exactly the same circumstance. These witnesses won't  
15 answer my questions, so they shouldn't be allowed to come  
16 to court and testify when they won't answer appropriate  
17 questions.

18 The Hutchinson court, Supreme Court decision, affirmed  
19 the court and said that that's a reasonable remedy. It's  
20 up to the trial court to fashion an appropriate remedy, but  
21 the question is, is there another possible remedy? I  
22 suppose the court could order a second deposition and try  
23 to force them to answer questions again. But given the  
24 timing, given the way they've behaved, I don't know why we  
25 would put us on that merry-go-round some more, given what

1 we've been through. The court should also consider the  
2 impact of the witnesses, and these are important witnesses,  
3 but also the impact on the defense is extraordinary. The  
4 prejudice to the non-violating party, that's us, the  
5 prejudice is extreme, given how much time they've delayed,  
6 given the way they've behaved, given what they've put us  
7 through. And another question is whether it was bad faith,  
8 and clearly in this instance it's got to be bad faith.

9 I can't see how any further order of this court would  
10 remedy the situation and give Ms. Stevens an opportunity  
11 for a fair trial. I just don't see how it can under these  
12 circumstances, given their refusal to appear, the court  
13 orders them to appear, they refuse to appear again, we're  
14 forced to file a motion. Once the motion is filed then  
15 they come to the depositions reluctantly.

16 I mean I can't tell you -- one of these witnesses was  
17 screaming at me at the top of her lungs during this  
18 deposition, to the point where we had to cancel and I had  
19 to say that we're not going to be able to go forward unless  
20 you can behave yourself, and this was going on and on and  
21 on through the whole process.

22 We should not be forced to have to go through this  
23 again, and certainly Ms. Stevens shouldn't be forced to  
24 have to waive her speedy trial rights and ask for another  
25 continuance under these circumstances. I know this is a

1 very significant case, it's an important case for  
2 everybody, but both sides deserve a right to a fair trial.  
3 Both sides deserve an opportunity to prepare.

4 The City has cited the Brady cases, which is  
5 interesting. Those are cases post verdict, and in a Brady  
6 situation you ask yourself, was the testimony -- was the  
7 evidence that was withheld material, meaning would it have  
8 made a difference to the verdict, but that's not what you  
9 decide pretrial. Pretrial discovery, if the side is  
10 entitled to it, it has to be turned over. It's not for the  
11 court or the prosecutors to decide what's important and  
12 what's not. That's exactly what the Garcia court said.  
13 They can't pick and choose and decide what they want to  
14 have us have -- have us see. And, frankly, to avoid a  
15 Brady problem, that's why you have these discovery rules  
16 and these disclosure standards.

17 So we think that this is an appropriate case for that  
18 extraordinary remedy of dismissal, but at the least, we ask  
19 the court to rule that these witnesses cannot testify at  
20 this case, given what they've put us through, and given how  
21 it's now going to be impossible for us to do anything more  
22 in the next week or two weeks to get prepared for hearings  
23 we have on January 6th and then at trial, which is soon  
24 thereafter.

25 And I would be open to any other ideas that the court

1 had or any other remedy. I know that the prosecutor said,  
2 well, the court should review the entire transcripts. I've  
3 been calling the court reporter and asking when they'll be  
4 completed, but obviously the witnesses' delay, delay,  
5 delay, delay, and pushed her right up to the holiday, and  
6 we haven't seen them yet. I've asked that they be  
7 expedited, and if the court wants to see them, we'd ask to  
8 provide them ex parte so the court could review them. But  
9 since the City has not disputed one fact that we've  
10 claimed, I don't think it's even necessary under the  
11 circumstances.

12 Unless the court has any questions, I will just be  
13 willing to provide any other information that the court  
14 would need to make a proper ruling.

15 THE COURT: All right, thank you, Mr. Maybrown.

16 Ms. Offutt?

17 MS. OFFUTT: Thank you, your Honor. As Mr. Maybrown  
18 stated, we're here based on his motion that was filed on  
19 December 11, 2014. In that motion he asked for dismissal  
20 by the court under 4.7 and CrRLJ 8.3. 8.3 dictates that  
21 the court dismiss the case in the interest of justice. So  
22 that's what the City is operating under the assumption,  
23 that that's the motion that we're here on today.

24 It's the City's position, first and foremost, that that  
25 motion, as we sit here today, is moot because the

1 depositions did, in fact, take place on December 19th. And  
2 despite the characterizations by defense counsel, it's the  
3 City's position that the witnesses were cooperative with  
4 regard to answering questions on the night in question, and  
5 I'll get to those other concerns that counsel cited in a  
6 moment.

7 But first, a motion to dismiss under CrRLJ 8.3 requires  
8 the defendant to show two things. First, arbitrary action  
9 or governmental misconduct on the part of, in this case,  
10 the City, the prosecutorial authority. As Mr. Maybrown  
11 stated, depositions were scheduled for December 2nd, 2014.  
12 On the morning of December 2nd, all parties involved -- and  
13 Mr. Maybrown did state this. All parties involved found  
14 out that the witnesses' independent counsel, Mary Gaston,  
15 was canceling those depositions based on her interpretation  
16 of certain statutes, as well as the fact that the witness,  
17 C.O., was in the hospital at the time.

18 Ms. McElyea and I had cleared our schedules for that  
19 afternoon in order to partake in those depositions, and as  
20 soon as we found out that those depositions were not going  
21 to take place that afternoon, we immediately supplied  
22 counsel with two alternative dates, December 12th and  
23 December 15th, during which we would be available and we  
24 would attempt to get the witnesses there to conduct the  
25 depositions. Those dates did not work for the independent

1 counsel, Ms. Mary Gaston, and so Mr. Maybrow then filed  
2 the current motion before the court on December 11th.

3 That same day Ms. McElyea confirmed with the witnesses  
4 that they would be available on December 19th for  
5 depositions. C.O. was then out of the hospital and  
6 everybody would be present and accounted for.

7 And I have the e-mails, your Honor, if you would like to  
8 take a look at those, that show Ms. McElyea's diligence in  
9 coordinating these depositions and the City's willingness  
10 to work with all parties involved.

11 In order to avoid any confusion, based on Ms. Gaston's  
12 misinterpretation or different interpretation of the  
13 statutes, the City did send subpoenas for the witnesses to  
14 appear in court. We sent those on December 12th, they were  
15 filed with the court, they were sent to both witnesses, and  
16 then the depositions were held on December 19th. So as far  
17 as that first prong that the defendant must show, arbitrary  
18 action or governmental misconduct, the City doesn't believe  
19 that they've been able to meet that burden. The rule does  
20 not provide for dismissal based on actions of witnesses or  
21 of independent counsel. It is based on the prosecutorial  
22 misconduct, and that was not the case here.

23 The second prong then, your Honor, that the defendant  
24 must show is that the right to fair trial was prejudiced.  
25 In this case there can be no prejudice found. Counsel

1 cited the Micheli case, in which the court found prejudice  
2 when the State filed four brand new charges only three  
3 business days before trial, when in that case the State had  
4 no new investigation or additional facts to support a new  
5 charge. In that case it was only three days before trial.

6 In this case the deposition occurred more than a month  
7 before the trial is scheduled. We're not scheduled to  
8 commence until January 20th. The depositions happened on  
9 December 19th. Under the facts of the Micheli case and the  
10 facts here, counsel has had ample time before trial to  
11 continue to investigate and to prepare for trial.

12 Therefore, just based on the dismissal that's before the  
13 court here today, your Honor, under 4.7 and 8.3, this  
14 extraordinary remedy is not one that's appropriate here,  
15 because the defendant has not met those burdens.

16 Counsel in his December 23rd declaration appeared to add  
17 numerous issues for the court to address. It is the City's  
18 position first and foremost that doing so by declaration  
19 was not only inappropriate but did not provide the City  
20 ample time to respond to his concerns, given the fact that  
21 was only five days ago. We received it seven days ago, I  
22 apologize.

23 However, I will address those as Mr. Maybrown has also  
24 done. First he cites the witnesses' obstructionist tactics  
25 in not answering questions regarding C.O.'s medical

1 history. Second, he adds the issue of the witnesses'  
2 strategy of intimidation and he cites malicious statements,  
3 attempts to intimidate, and says that Teresa Obert in  
4 particular used the proceedings as a forum to damage  
5 Ms. Stevens' reputation. I'm going to address each one of  
6 these in turn, your Honor.

7 The other additional statement that Mr. Maybrown  
8 included in his declaration was the witnesses'  
9 newly-contrived claims, statements that the depositions  
10 differed from statements to the police when the witnesses  
11 spoke with the police in June.

12 And, finally, Mr. Maybrown also included the issue that  
13 witnesses destroyed items of evidence.

14 All of those issues overall the City objects to, your  
15 Honor. First of all, they were not properly briefed. They  
16 were brought to the court's attention under a declaration  
17 that was attached to a motion to dismiss under 8.3 and 4.7.  
18 They were not brought to the court's attention under a  
19 Knapstad motion or a 3.6. Those are both noted according  
20 to the pretrial order for the 6th of January, not for  
21 today's consideration.

22 However, each of those also relies on Mr. Maybrown's own  
23 perceptions, recollections, and representations of the  
24 events of the depositions. He himself is stating to the  
25 court how he remembers those depositions occurring. He has

1 provided no transcript of the deposition, and therefore  
2 everything that he is stating under his declaration is  
3 hearsay. He's telling the court what the witnesses said  
4 when there is no transcript of what they said under penalty  
5 of perjury. The deposition does provide that those --  
6 those statements that they are making are made under  
7 penalty of perjury, but we haven't seen those, and your  
8 Honor hasn't had a chance to review those. By doing so,  
9 Mr. Maybrown is then making himself a witness and  
10 attempting to improperly testify as to the facts of the  
11 case, because those deposition transcripts have not been  
12 provided. He is only filtering what the court hears today  
13 through his own memory.

14 He's asking the court, by introducing these additional  
15 issues, to make a determinations of evidence based on the  
16 facts that he's, in the City's opinion, improperly  
17 presented to the court. Those facts that he's presented to  
18 the court are the proper province of the jury. They are  
19 not for the court to address and decide here today. As  
20 I've already stated, if he wants to bring those motions,  
21 the proper forum is a 3.6 motion or a Knapstad motion,  
22 neither of which are here today. And for the record, your  
23 Honor, the City does disagree with Mr. Maybrown's  
24 characterization of all of the facts in his declaration and  
25 this court should not assume that the City is in agreement

1 with those facts:

2 Turning to each of those issues in turn, your Honor,  
3 regarding the obstructionist tactics, as Mr. Maybrow so  
4 states, the majority of those concerns in his declaration  
5 were because of the victims', the alleged victims' refusal  
6 to answer questions regarding C.O.'s medical history and  
7 his medical care. The victim is represented by an  
8 independent attorney. The victim's right statute, RCW  
9 7.69.030, subsection 10, allows that victims are permitted  
10 to have a support person present of their choosing. They  
11 have chosen to have independent counsel. Independent  
12 counsel was there at the deposition and chose to make  
13 objections and instruct her individual witnesses not to  
14 answer certain questions. Those questions were with regard  
15 to C.O.'s medical history. The City has no ability or  
16 authority to disclose evidence that it is not in control of  
17 or not in possession of. 4.7 only covers material in  
18 prosecutor's possession and control. We don't have a  
19 medical release signed here today for C.O. We don't have  
20 access to those medical records, and if Mr. Maybrow wants  
21 those medical records, he needs to properly go through  
22 Ms. Gaston, the victims' attorney.

23 In addition, I believe that it came out eventually, your  
24 Honor, though it was maybe improperly stated during the  
25 deposition, that this was actually an objection based on

1 the doctor-patient privilege, and had we had copies of the  
2 transcript, I think that that would have been shown.

3 With regard to the witnesses', quote, strategy of  
4 intimidation, Mr. Maybrown alleges that these were  
5 malicious statements, attempts to intimidate, use of  
6 proceedings as a forum to damage Ms. Stevens' reputation.  
7 The City wholeheartedly agrees with this characterization,  
8 both of us having been there and been present for those  
9 depositions. Again, this is Maybrown -- Mr. Maybrown's  
10 perception, as there is no full transcript.

11 Finally, Mr. Maybrown is a very experienced trial  
12 attorney. It can come as no surprise that victims of an  
13 assault such as this would be emotional and react  
14 accordingly when questioned by somebody who they view as  
15 opposing them. That can come as no surprise. And, in  
16 fact, the City would characterize that as exactly what  
17 happened.

18 Furthermore, your Honor, Mr. Maybrown indicates that he  
19 is seeking information, and by noting the witnesses'  
20 strategy of intimidation as he so puts it, he's got his  
21 impeachment evidence. That is what the purpose of these  
22 meetings and depositions are, is for him to examine how the  
23 witnesses react, what their credibility looks like, how  
24 they might testify on the stand, and he's now received that  
25 information, because the depositions lasted for an hour and

1 a half of each of the individual people, and he had more  
2 than ample opportunity to delve into the facts of the case  
3 that night and get his impeachment evidence.

4 Third, your Honor, Mr. Maybrown cites the witnesses'  
5 newly-contrived claims. Once again, it can come as no  
6 surprise to an experienced trial attorney that on occasion,  
7 and probably often, witnesses' statements when they're  
8 given to the police officers the night of an event,  
9 particularly one that was so fraught with emotion between  
10 family members, as here, would add or misremember things  
11 that then they clarify later, and, again, that is the  
12 purpose for the deposition. Once again, Mr. Maybrown has  
13 uncovered that information. He has ample opportunity to  
14 explore that, as evidenced by the fact that he did, in  
15 fact, get to ask the witnesses about their inconsistent  
16 statements. He's got his impeachment evidence, if that's  
17 what he was seeking.

18 And, finally, your Honor, the fact that the witness has  
19 destroyed items of evidence, also this comes under  
20 impeachment evidence. It goes to the credibility of  
21 witnesses at trial, and all of these claims that  
22 Mr. Maybrown is stating are in support of a motion to  
23 dismiss are, in fact, more properly heard before a jury, so  
24 that the jury can weigh the credibility of the witnesses  
25 and hear all of the evidence presented to them.

1           Finally, your Honor, Mr. Maybrown addresses the  
2 prosecutor withholding evidence, or the prosecutors in this  
3 case withholding evidence. Once again, I'll note the  
4 City's position is that this was not properly briefed for  
5 this hearing, based on the motion to dismiss under 8.3.  
6 However, Mr. Maybrown has requested the prosecutors to give  
7 him all of our notes from the interviews that we conducted  
8 with the Oberts. He also notes that he was not permitted  
9 to be there. And, again, as an experienced trial attorney,  
10 it can come as no surprise that the City would conduct  
11 independent interviews of their witnesses in order to  
12 prepare for trial and to understand all of those additional  
13 details.

14           I believe your Honor has said before in the past that  
15 trial preparation is much like a snowball, and that's  
16 exactly what's happened here, your Honor.

17           Regarding the Brady violation, a Brady violation must  
18 have three things. First, the evidence at issue is  
19 favorable to the accused, either because it is exculpatory  
20 or because it is impeaching. As I've already stated, your  
21 Honor, Mr. Maybrown conducted a successful deposition of  
22 the witnesses with regard to any and all facts that  
23 happened that night and has the ability to then delve into  
24 those issues and conduct further investigation into those  
25 statements that they made.

1           Number two for a Brady violation, evidence must have  
2           been suppressed by the State, either willfully or  
3           inadvertently, and this is the one that absolutely has not  
4           happened, because he's had a chance to depose these  
5           witnesses. The State hasn't suppressed these statements,  
6           even if it's -- arguably, if there are any, because  
7           Mr. Maybrown has had a chance to depose the witnesses.

8           And, finally, prejudice must have ensued. Again, we're  
9           talking about a deposition that happened more than a month  
10          prior to trial. A month of trial preparation, based on the  
11          depositions and the information that the witnesses provided  
12          at the deposition is more than enough for Mr. Maybrown to  
13          prepare for trial. A Brady violation does not arise if the  
14          defendant, using reasonable diligence, could have obtained  
15          the information herself in this case. That's exactly what  
16          happened here. Mr. Maybrown conducted the deposition using  
17          reasonable diligence. He obtained the information that  
18          he's seeking. The prosecutor is not required to hand over  
19          her entire file or point out proof of lines of questioning  
20          that would assist the defense theory. We only have to  
21          provide access to the witnesses, which has been done, per  
22          the court's order, as we sit here today.

23          Under State v. Mullen, if a prosecutor provides a  
24          pretrial opportunity to examine the City's witnesses, all  
25          Brady obligations have been satisfied with respect to the

1 contents of a witness's testimony. I can't say it enough.  
2 It's already happened. The deposition took place on the  
3 19th.

4 In this case, your Honor, the City has satisfied its  
5 obligation. Our notes are our work product. They contain  
6 trial strategy and preparation materials, and the defendant  
7 is not entitled to them. If the defendant would like to  
8 challenge that, there are ways of doing that, but today is  
9 not the forum to do so because he has not properly briefed  
10 it. In short, your Honor, the City's position is that the  
11 defendant has not met the burden for dismissal under CrRLJ  
12 8.3, subsection (b), and the additional allegations that  
13 he's included in his declaration should not be considered  
14 today by your Honor.

15 THE COURT: Okay, thank you, Counsel.

16 Anything further, Mr. Maybrow?

17 MR. MAYBROWN: Very briefly. Your Honor, obviously time  
18 has been of the essence for a long time here, and I  
19 provided information to the court as quickly as I could,  
20 because we've been trying to move the case. I don't hear  
21 the City disputing any of the facts in my declaration, and  
22 we would be happy to provide the full transcripts, because  
23 they're actually worse than my characterization in my  
24 declaration, and I welcome the court to look at that, but I  
25 don't think it's necessary.

1 I should say, about 8.3(b), the provision is  
2 mismanagement by the prosecutors or arbitrary action. It  
3 doesn't say arbitrary action by the prosecutors, and I  
4 think that what we have here is arbitrary action. We have  
5 destruction of evidence, we have refusal to participate in  
6 interviews, we have all of the type of arbitrary,  
7 unreasonable action that you could ever imagine in a case  
8 of this sort.

9 And lastly, I don't even hear and understand why they're  
10 refusing to turn over summaries of the witnesses'  
11 statements. Criminal Rule 4.7 says that they're required  
12 to provide all oral statements of their witness -- of these  
13 witnesses. And State v. Garcia says, and I'm quoting:  
14 Notes taken by prosecutors are not work product. So,  
15 frankly, I don't understand why we have to go through this.  
16 I've made it clear in my motion, initially, that I was  
17 seeking this information in advance of even filing a  
18 supplemental declaration.

19 So it seems to me the court has all of the information  
20 necessary. Some remedy is absolutely necessary because of  
21 these discovery violations. If the court has some  
22 alternatives, I'm open to discussing all possibilities. I  
23 came back from a vacation to be here today because this is  
24 so important to us to move forward. But given the way  
25 these witnesses have behaved, I think the court can easily

1 decide that the only fair remedy would be to suppress their  
2 testimony and ultimately I think the case should be  
3 dismissed.

4 THE COURT: Okay, thank you, Counsel.

5 All right. Well, I've read the memorandum and briefing  
6 of both counsel, and as both counsel recall, I heard the  
7 motions earlier, back on November 4th, when defense moved  
8 for depositions because of the reputed repeated refusal of  
9 the material witnesses to sit for a reported interview.  
10 This court granted that motion on November 4th.

11 Gleaning from the memorandum that I've reviewed, and  
12 hearing the oral testimony here today, shortly thereafter  
13 the defense contacted all parties, and November 25th, 2014  
14 was scheduled for the depositions. Defense counsel  
15 properly issued written notices of the depositions  
16 confirming the date and time. Those were provided to all  
17 counsel involved in this case, both the prosecuting  
18 authority and apparently the witnesses' private --  
19 privately-retained counsel.

20 On November 14, 2014, one of the prosecuting attorneys  
21 called and asked defense counsel to reschedule the  
22 deposition for the afternoon of December 2nd. Now, in the  
23 briefing I didn't see any reason for this requested delay.  
24 I'm now hearing in oral argument that it was because the  
25 witness was in the hospital. As a professional courtesy,

1 defense counsel agreed and rescheduled the deposition. The  
2 defense e-mailed amended notices to all parties. According  
3 to the briefing and attachments, private counsel for the  
4 government witnesses acknowledged receipt of the e-mail and  
5 stated she did not need to receive hard copies.

6 Still, on December 2nd, defense counsel received an  
7 e-mail notice of unavailability from the private attorney.  
8 Included were additional comments that her clients had  
9 never received subpoenas for any deposition. Later,  
10 according to the briefing, the attorney's assistant wrote  
11 to defense counsel that the attorney was not in the office  
12 and that the witnesses did not intend to appear at the  
13 deposition.

14 Subsequent to this delay, according to the briefing  
15 filed, the prosecutor told defense counsel she asked the  
16 witnesses' private attorney to consider another date. As  
17 of December 9th, neither the prosecutor nor private  
18 attorney for the government witnesses responded.  
19 Understandably, defense counsel filed a motion to dismiss,  
20 based on the material witnesses' continued refusal to sit  
21 for a court-ordered deposition. On December 11th, 2014,  
22 after the court scheduled this hearing to address defense  
23 counsel's motion to dismiss, the prosecutors called defense  
24 counsel indicating that the witnesses would now agree to a  
25 deposition on December 19th, 2014. That deposition took

1 place.

2 During the deposition, amongst other things, defense  
3 counsel asked the first witness if he was using any  
4 medication. The witness stated, according to the briefing,  
5 that he was. Defense counsel asked him what the medication  
6 was. Private counsel interrupted and instructed the  
7 witness not to answer. Apparently, according to briefing,  
8 the prosecuting attorney remained silent. Defense counsel  
9 asked the witness if he was using the medication at the  
10 time of the alleged assault. The witness stated he was.  
11 Defense counsel asked him what the medication was. Again,  
12 private counsel instructed the witness not to answer.  
13 Again, according to the briefing, the prosecuting attorney  
14 remained silent.

15 These are relevant inquiries of a material witness.  
16 Just as it is relevant to know whether a witness is under  
17 the influence of intoxicants at the time he or she is  
18 testifying in court or at a deposition or at the time he or  
19 she is witnessing an event, so is it relevant to know if a  
20 witness is under the influence of medication that may or  
21 may not contain narcotics, hallucinogens, depressants,  
22 sleep aids, et cetera.

23 According to the briefing, the witness also advised  
24 defense counsel that he was unable to attend the December  
25 2nd deposition because he was in the hospital. Defense

1 counsel asked if the witness was in the hospital related to  
2 his claims in this case. The witness stated yes. Private  
3 counsel then instructed the witness to not answer any  
4 questions regarding his stay at the hospital. Apparently,  
5 according to briefing, the prosecuting attorney remained  
6 silent as to this line of questioning as well.

7 This, likewise, was a relevant inquiry. If the material  
8 witness went to the hospital as a result of the alleged  
9 assault or altercation, the doctor's assessment and other  
10 physical and mental conditions having to do with this  
11 hospital stay are relevant and discoverable.

12 In addition, according to briefing, one of the material  
13 witnesses is now saying she was present during the  
14 altercation. This is noteworthy and important for purposes  
15 of discovery because, according to briefing, this same  
16 witness stated to the police and signed a written statement  
17 confirming she was not present during the altercation.

18 Further, one of the witnesses is now stating that the  
19 defendant slammed his head against a cement wall five to  
20 ten times during this event. According to briefing, this  
21 witness made no such statement to the police during their  
22 investigation.

23 The defendant is now moving to dismiss the charges in  
24 this case in the furtherance of justice and due to a  
25 violation of her right to effective assistance of counsel

1 and fair due process. The City is resisting the motion,  
2 arguing that the deposition occurred as ordered. Further,  
3 that this court should not make a ruling concerning the  
4 alleged obstructionist efforts of government witnesses  
5 until this court has reviewed the transcripts of the  
6 deposition. Still, defense counsel mentions in his  
7 briefing that he presents some summaries of the deposition  
8 for the court as an officer of the court. The prosecuting  
9 authority has not denied the validity or substantive  
10 language of the defense summaries presented to this court  
11 in her briefing. This court will nonetheless delay ruling  
12 on defense motions until transcripts are available.

13 In the meantime, however, this court will issue the  
14 following remedial orders: The substantial change in  
15 observations, medical conditions and/or injuries and the  
16 material witnesses' versions of the events herein has now  
17 changed the recent private witness interviews between the  
18 prosecuting attorney and the two material witnesses from  
19 work product to discovery. Consequently, it is an order of  
20 this court that all prosecutor notes and recordings, if  
21 any, concerning those interviews be turned over to defense  
22 counsel by today at 4:30 p.m.

23 Further, a second deposition is hereby ordered to take  
24 place this Friday, January 2nd, at 8:30 a.m., here at  
25 Kirkland Municipal Court in the Totem Lake Room. My

1 clerical staff will direct all parties to that location.  
2 The prosecutors are to be present and assist with the  
3 interview.

4 Evidence is often discoverable but may not always be  
5 admissible at trial. This is a criminal case involving the  
6 defendant's constitutional rights to fair due process,  
7 confrontation of witnesses, and effective assistance of  
8 counsel. At the deposition this Friday, so long as the  
9 inquiries are relevant, the interview should be unfettered.  
10 This will include inquiries concerning the witnesses' use  
11 of alcohol, drugs or prescribed medicines at the time of  
12 the incident, mental health issues, hospital stays that  
13 occurred as a result of this criminal case, et cetera. If  
14 there are questions and answers appearing in the transcript  
15 of this second deposition that the prosecutor feels is  
16 inadmissible during trial, they should be highlighted and  
17 addressed to the court at the motion hearing currently  
18 scheduled for January 6th at 1 p.m.

19 That concludes my ruling.

20 MS. OFFUTT: Thank you, your Honor.

21 MR. MAYBROWN: Thank you, your Honor. I'll step back  
22 and try to prepare an order consistent with the court's  
23 ruling.

24 (PROCEEDINGS ADJOURNED.)

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CERTIFICATE

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STATE OF WASHINGTON )  
 ) ss.  
COUNTY OF KING )

I hereby declare under penalty of perjury that the foregoing transcript of proceedings was prepared by me or under my direction from electronic recordings of the proceedings, monitored by me and reduced to typewriting to the best of my ability;

That the transcript is, to the best of my ability, a full, true and correct record of the proceedings, including the testimony of witnesses, questions and answers and all objections, motions and exceptions of counsel made and taken at the time of the proceedings;

That I am neither attorney for, nor a relative or employee of any of the parties to the action; further, that I am not a relative or employee of any attorney or counsel employed by the parties hereto, nor financially interested in its outcome.

Dated this 10th day of June, 2015.

*Linda A. Owen*

\_\_\_\_\_  
Linda A. Owen

# MOBERLY & ROBERTS, PLLC

May 16, 2018 - 4:45 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

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