ARTHUR D. CURTIS
PROSECUTING ATTORNEY

CURT WYRICK
CHIEF DEPUTY

DENNIS M. HUNTER
CHIEF CRIMINAL DEPUTY

E. BRONSON POTTER
CHIEF CIVIL DEPUTY

SHARI JENSEN
ADMINISTRATOR

April 21, 2009

Ronald Carpenter
Clerk of the Supreme Court
PO Box 40929
Olympia WA 98504-0929

Subject Proposed Amendments to CrR 4.8

Dear Mr. Carpenter:

I take this opportunity to express serious concern about the proposal to amend CrR 4.8(2) to authorize the issuance of subpoena for production of documents and evidence without first requiring court approval and a showing of cause.

As proposed, any attorney, whether prosecutor or defense attorney may issue subpoenas for production of documents without first requiring the party to make a showing to the court of the need for the documents. When subpoena are for documents or materials related to the victim or defendant, the attorney issuing the subpoena must provide 5 days notice to the opposing side and to the victim (if the subpoena is related to the victim) before issuing the subpoena. Rather than showing justification to the court that the subpoena is needed, the proposed rule shifts the burden to the victim and other side to prove the impropriety of the subpoena. This reverses long standing authority in Washington, unduly burdens victims and witnesses, and is ripe for abuse.

Historical Precedence

The Washington and US Supreme Courts have long held there is only a very limited right to pre-trial discovery in criminal cases. In State v. Clark, 21 Wn.2d 774, 153 P.2d 297 (1944), our state Supreme Court held there is no constitutional right to discovery in a criminal case, even to the point where the defendant was not entitled to copies of his own statements to police. See also, State v. Thompson, 54 Wn.2d 100, 338 P.2d 319 (1959). These cases were modified somewhat by Brady v. Maryland, 373 U.S. 83, 10 L.Ed.2d 215, 83 S.Ct. 1194 (1963), which required disclosure of exculpatory materials.

1013 FRANKLIN STREET PO BOX 5000 VANCOUVER, WASHINGTON 98666-5000
(360) 397-2261 Office (360) 397-2230 FAX

But even Brady did not create a right to general discovery.

> *There is no general constitutional right to discovery in a criminal case and Brady* {v. Maryland, 373 U.S. 83, 10 L.Ed.2d 215, 83 S.Ct. 1194 (1963)] *did not create one*; *as the court wrote recently, ' the Due Process Clause has little to say regarding the amount of discovery which the parties must be afforded...*

Wetherford v. Bursey, 429 U.S. 545, 559, 51 L.Ed.2d 30, 97 S.Ct. 837 (1977).

Although there is no Constitutional right to discovery (except for Brady material), Washington adopted the discovery rules of CrR 4.7 to require the prosecutor to give discovery to the defendant, in exchange for the defendant to give reciprocal discovery to the prosecutor. State v. Boheme, 71 Wn.2d 621, 632, 430 P.2d 527 (1967). This scheme authorizes and encourages both sides to exchange information and seek evidence to assist with their case.

Procedures similar to Washington's were approved by the US Supreme Court when it held that states may require the defense to provide information related to his case, i.e. his defenses and witnesses, *on condition* that the state be required to provide simultaneous exchange of information. See Williams v. Florida, 399 U.S. 78, 26 L.Ed.2d 446, 90 S.Ct. 1893 (1970), Wardius v. Oregon, 412 U.S. 470, 37 L.Ed.2d 82, 93 S.C.t 2208 (1973).

Under our existing discovery rules, a party may obtain a subpoena for production of records if they show the materiality of the records to the court. CrR 4.7(d). This showing of materiality is not to be taken lightly. They must show more than that the evidence "*might* have helped the defense or *might* have affected the outcome of the trial" to establish "materiality" in the constitutional sense. State v. Bebb, 108 Wn.2d 515, 523, 740 P.2d 829 (1987); State v. Mak, 105 Wn.2d 692, 704-5, 718 P.2d 407, *cert. denied*, 107 S. Ct. 599 (1986). Thus, the current rules limit subpoenas to things which the court finds are actually helpful, rather than just "fishing expeditions" to look for things that "might" be helpful.

Effect of Proposed Amendment

At first glance, the proposal appears to streamline the procedures for issuance of discovery subpoenas. However, the proposed rule eliminates many of the protections built into the current rule and will, inevitably, result in more arguments about records.

The proposed amendment eliminates the court's role in determining whether a subpoena should issue. This poses difficulties in cases and is ripe for abuse. For example, under the rule, there is nothing to prohibit a defense attorney from issuing a subpoena to each and every police officer to personally bring a copy of his or her report to the attorney's office. An attorney can by-pass the public records process and simply issue subpoenas to obtain records such as the records from government agencies, without going through the statutory process to obtain them and pay their costs.

The rule also can be read to eliminate the requirement that the evidence sought are *material* to the investigation or defense as required by the current rule. The attorney may issue subpoenas without regard to having to demonstrate the need for the records. This invites "fishing expeditions" and may be seen as harassment by victims and witnesses.[1]

Potential for Abuse

Examples abound which suggest the rule is ripe for abuse. Under the rule, a defense attorney must notify the victim and prosecutor if he or she issues a subpoena for records related to the victim. At the same time, there is no notice requirement to subpoena records of a child abuse victim's *sister or brother* who may or may not be on the State's witness list in order to find out more about the family dynamic. Entities receiving the subpoena may respond without the child, parent or prosecutor ever learning the records are under subpoena. Who is there to consider or stand up to protect the constitutionally protected privacy interests of those children?

In a case involving police and government agencies, there is nothing in the rule which precludes a defense attorney from issuing a subpoena to each and every officer in a case to have the officer bring copies of his or her reports to the attorney's office, despite the fact that the court has previously held there is no right to police reports. Cf, State v. Mak, 105 Wn.2d 692, 718 P.2d 407 (1986).

> If an accused requested further disclosure, he must show that the requested information is material to the preparation of the accused defense. The mere possibility that an item of undisclosed evidence might have helped the defense or might have affected the outcome of the trial, however, does not establish 'materiality' in the Constitutional sense.... He made no showing that the requested information was material to his defense. To the contrary, his claim is that the files "may have contained information critical to the defense" or "might lead to other evidence." This is not sufficient to establish a showing of materiality such as to compel the Court to grant a discovery request.

Mak, at 705-705. Cf. State v. Bebb, 44 Wn.App. 803, 817, 723 P.2d 512 (1986).

> Yet another question is raised by these subpoenas: Is an attorney acting scrupulously or unscrupulously by compelling each and every police officer to bring the report to his office despite having received a copy from the prosecutor?

Protection of Rights?

Proposed CrR 4.8(b)(4) provides that a court may quash or modify a subpoena under certain circumstances. Missing from this provision is the requirement that the person or entity served with the subpoena be told of this right. Similarly, if the records sought relate to a witness, neither the witness nor prosecutors are apprised of the subpoena, so how can they move to

---

[1] While it's true that there is a provision to seek protection from a subpoena for production which doesn't comply with the discovery rule (proposed CrR 4.8(B)(4)), how can the opposing side object, if they don't know about it?

quash it? Moreover, who has standing to move to quash? Must the victim or witness hire an attorney, or may the prosecutor step in?

Conclusion

CrR 4.8(2) is flawed. It changes the historical scope and basis of discovery. It invites abuse of the subpoena power to compel officers and government agencies to comply with subpoenas without any showing of justification for the subpoena.

CrR 4.8(2) invites abuse of victims and witnesses of crimes by allowing issuance of subpoenas which invade their personal affairs without any showing of need or justification, and often times, without them knowing about it.

Finally, CrR 4.8(2) fails to provide a proper and adequate mechanism for a witness, victim, or governmental agency to stand up and oppose the invasion of their personal affairs. If they learn of the efforts to seek their records, they realistically have no meaningful way for them to protest the unwarranted invasions of their lives.

Please reject the proposed amendments to CrR 4.8(2).

Arthur D. Curtis,
Prosecuting Attorney

Cc: Tom McBride, WAPA
Pam Loginsky, WAPA
Dennis Hunter, Chief Criminal Deputy
Kim Farr, Senior Deputy Prosecuting Attorney
Mary Blanchette, Children's Justice Center Executive Director