

Tracy, Mary

From: OFFICE RECEPTIONIST, CLERK
Sent: Monday, August 20, 2018 11:57 AM
To: Tracy, Mary
Subject: FW: Comment on proposed rules CrR 4.7 and CrRLJ 4.7
Attachments: CrR 4.7-suggested.pdf; CrRLJ 4.7-suggested.pdf

From: Terry Bloor [mailto:Terry.Bloor@co.benton.wa.us]
Sent: Monday, August 20, 2018 11:55 AM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Subject: Comment on proposed rules CrR 4.7 and CrRLJ 4.7

The stated purpose of the proposed rules are "to bring the rule into accord with *Brady v. Maryland* (citation) and its progeny. Actually, the proposed rule expands *Brady* way beyond it's intent requiring a prosecutor to provide evidence which mitigates the guilt or sentence of a defendant which is in the hands of members of the "prosecution team." Here's a good synopsis of the status of *Brady*.

Brady has typically not required a prosecutor to seek out negative evidence that is in the hands of people who are not members of the "prosecution team." Law enforcement offices not involved in the investigation are generally not included in the prosecution team. See, e.g., *United States v. Beers*, 189 F.3d 1297, 1303-04 (10th Cir. 1999) (declining to impute to federal prosecutors information possessed by state officials); *Moon v. Head*, 285 F.3d 1301, 1310 (11th Cir. 2002) (refusing to impute to a Georgia prosecutor evidence possessed by a Tennessee Bureau of Investigation agent because the agencies shared no resources or labor); *United States v. Morris*, 80 F.3d 1151, 1169 (7th Cir. 1996) (*Brady* did not require the government here to seek out allegedly exculpatory information in the hands of the Office of Thrift Supervision ("OTS"), the Securities Exchange Commission ("SEC"), or the Internal Revenue Service ("IRS") when it had been unaware of the existence of that information and when none of those agencies were part of the team that investigated the case or participated in its prosecution); *Barnett v. Superior Court*, 50 Cal. 4th 890, 114 Cal. Rptr. 3d 576, 237 P.3d 980 (2010) (an out-of-state law enforcement agency that gathered information but did not provide it to California prosecutors is not part of the California prosecution team for purposes of *Brady*).

Also, there is no need to change the current procedure regarding providing written redactions of reports to a defendant. Having a prosecutor review the proposed redactions is a good double

check on the work of the defense attorney; sometimes personal information is missed. The proposed rule also limits the redactions to certain identifiers—date of birth, social security numbers, addresses, phone numbers, etc. However, there are often descriptions of events in police reports that should be redacted. A witness's home address or locale can often be deduced from a description in a police report. There is no need to change the present rule.

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1 **SUGGESTED AMENDMENT TO CRIMINAL RULE CrR 4.7 DISCOVERY**

2 **CrR 4.7 DISCOVERY**

3 **(a) Prosecutor's Obligations**

4 (1) Unchanged.

5 (2) The prosecuting attorney shall disclose to the defendant:

6 (i) Unchanged.

7 (ii) Unchanged.

8 (iii) Unchanged.

9 (iv) All records, including notes, reports, and electronic recordings relating to an
10 identification procedure, as well as all identification procedures, whether or not the
11 procedure resulted in an identification or the procedure resulted in the identification of a
12 person other than the suspect.

13 (3) Except as is otherwise provided as to protective orders, the prosecuting
14 attorney shall disclose to the defendant's counsel any material or information within the
15 prosecuting attorney's knowledge which tends to negate defendant's guilt as to the offense
16 charged, and/or which tends to impeach a State's witness.

17 (4) The prosecuting attorney's obligation under this section ~~is limited to material~~
18 ~~and information within the knowledge, possession or control of members of the~~
19 ~~prosecuting attorney's staff.~~ includes material and evidence favorable to the defendant and
20 material to the defendant's guilt or punishment, and/or which tends to impeach a State's
21 witness. This includes favorable evidence known to others acting on the State's behalf in
22 the case, including the police. The prosecuting authority's duty under this rule not
23 conditioned on a defense request for such material. Such duty is ongoing, even after plea
24 or sentencing.
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1 (b) Defendant's Obligations. Unchanged.

2 (c) Additional disclosures Upon Request and Specification. Unchanged.

3 (d) Material Held by Others. Unchanged.

4 (e) Discretionary Disclosures. Unchanged.

5 (f) Matters Not Subject to Disclosure. Unchanged.

6 (g) Medical and Scientific Reports. Unchanged.

7 (h) Regulation of Discovery.

8 (1) *Investigation Not to Be Impeded*. Unchanged.

9 (2) *Continuing Duty to Disclose*. Unchanged.

10 (3) *Custody of Materials*. Any materials furnished to an attorney pursuant to these
11 rules shall remain in the exclusive custody of the attorney and be used only for the
12 purposes of conducting the party's side of the case, unless otherwise agreed by the parties
13 or ordered by the court, and shall be subject to such other terms and conditions as the
14 parties may agree or the court may provide. Further, a defense attorney shall be permitted
15 to provide a copy of the materials to the defendant after making appropriate the following
16 redactions: ~~which are approved by the prosecuting authority or order of the court.~~

17 (i) Dates of Birth—redact to the year of birth;

18 (ii) Names of Minor Children—redact to the initials;

19 (iii) Social Security Numbers or Federal Taxpayer Identification Numbers—redact
20 in their entirety;

21 (iv) Financial Accounting Information—redact to the last four digits;

22 (v) Passport Numbers and Driver License Numbers—redact in their entirety;

23 (vi) Home Addresses—redact to the City and State; and

1 (vii) Phone Numbers—redact in their entirety.

2 Each defense attorney shall maintain a duplicate copy of discovery furnished to the
3 defendant they are representing, which shows the redactions made in accordance with this
4 court rule for the duration of the case. The duplicate copy of discovery with redactions
5 shall be kept in the client's case file. If the defense attorney withdraws from representing
6 the defendant, the duplicate copy with redactions shall be furnished to the new attorney
7 and maintained in the new attorney's case file for the defendant for the duration of the
8 case. The court may, upon proper showing, request to see the duplicate copy with
9 redactions that has been furnished to the defendant, to make sure the redactions have been
10 properly made.

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12 (4) *Protective Orders.* Unchanged

13 (5) *Excision.* Unchanged

14 (6) *In Camera Proceedings.* Unchanged

15 (7) *Sanctions.* Unchanged
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1 **SUGGESTED AMENDMENT TO CRIMINAL RULE CrRLJ 4.7 DISCOVERY**

2 **CrRLJ 4.7 DISCOVERY**

3 **(a) Prosecuting Authority's Obligations**

4 (1) Except as otherwise provided by protective orders or as to matters not
5 subject to disclosure, the prosecuting authority shall, upon written demand, disclose to the
6 defendant the following material and information within his or her possession or control
7 concerning:
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9 (i) Unchanged.

10 (ii) Unchanged.

11 (iii) Unchanged.

12 (iv) Unchanged.

13 (v) Unchanged.

14 (vi) Unchanged.

15 (vii) Unchanged.

16 (viii) Unchanged.

17 (ix) Unchanged.

18 (x) Unchanged.

19 (xi) Unchanged.

20 (xii) All records, including notes, reports and electronic recordings relating to
21 an identification procedure, as well as all identification procedures, whether or not the
22 procedure resulted in an identification or the procedure resulted in the identification of a
23 person other than the suspect.
24

25 (2) Unchanged.

1 (3) Except as is otherwise provided as to protective orders, the prosecuting
2 attorney shall disclose to the defendant's counsel any material or information within the
3 prosecuting authority's knowledge which tends to negate defendant's guilt as to the
4 offense charged-, and/or which tends to impeach a State's witness.

5 (4) The prosecuting authority's obligation under this section ~~is limited to~~
6 ~~material and information within the actual knowledge, possession, or control of members~~
7 ~~of his or her staff.~~ includes material and evidence favorable to the defendant and material to
8 the defendant's guilt or punishment, and/or which tends to impeach a State's witness. This
9 includes favorable evidence known to others acting on the State's behalf in the case,
10 including the police. The prosecuting authority's duty under this rule not conditioned on a
11 defense request for such material. Such duty is ongoing, even after plea or sentencing.

12 **(b) Defendant's Obligations. Unchanged.**

13 **(c) Physical and Demonstrative Evidence. Unchanged.**

14 **(d) Material Held by Others. Unchanged.**

15 **(e) Discretionary Disclosures. Unchanged.**

16 **(f) Matters Not Subject to Disclosure. Unchanged.**

17 **(g) Regulation of Discovery.**

18 **(1) Investigation Not to Be Impeded. Unchanged.**

19 **(2) Continuing Duty to Disclose. Unchanged.**

20 **(3) Custody of Materials.** Any materials furnished to a lawyer pursuant to these
21 rules shall remain in the exclusive custody of the lawyer and be used only for the purposes
22 of conducting the party's side of the case, unless otherwise agreed by the parties or ordered
23 by the court, and shall be subject to such other terms and conditions as the parties may
24
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1 agree or the court may provide. Further, a defense lawyer shall be permitted to provide a
2 copy of the materials to the defendant after making ~~appropriate~~ the following redactions;
3 ~~which are approved by the prosecuting authority or order of the court.~~

4 (i) Dates of Birth—redact to the year of birth;

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7 in their entirety;

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14 court rule for the duration of the case. The duplicate copy of discovery with redactions
15 shall be kept in the client's case file. If the defense lawyer withdraws from representing the
16 defendant, the duplicate copy with redactions shall be furnished to the new lawyer and
17 maintained in the new lawyer's case file for the defendant for the duration of the case. The
18 court may, upon proper showing, request to see the duplicate copy with redactions that has
19 been furnished to the defendant, to make sure the redactions have been properly made.

20 (4) Protective Orders. Unchanged

21 (5) Excision. Unchanged

22 (6) In Camera Proceedings. Unchanged

23 (7) Sanctions. Unchanged