

From: [OFFICE RECEPTIONIST, CLERK](#)
To: [Martinez, Jacquelynn](#)
Subject: FW: Proposed rules CrRLJ 3,3, CrRLJ8.3, CrRLJ 4.7
Date: Thursday, February 15, 2024 11:39:33 AM
Attachments: [Proposed rules 2024.pdf](#)

From: George Steele <GSteele@masoncountywa.gov>
Sent: Thursday, February 15, 2024 11:32 AM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>; Michael Dorcy <MichaeD@masoncountywa.gov>; Peter Jones <PeterJ@masoncountywa.gov>
Subject: Proposed rules CrRLJ 3,3, CrRLJ8.3, CrRLJ 4.7

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I wished to comment about several rules that the Supreme Court is considering revising. They are:

The first is CrRLJ 3.3. I have real concerns about simply re-starting speedy trial, after a failure to appear, based upon the assurance of the defendant's lawyer. I believe that, while the vast, vast majority of attorneys are people I would completely trust, (As a profession, contrary to popular beliefs, we go to the point of almost being obnoxious about remaining ethical.) there are a few who should not be trusted, as far as simply appearing through counsel. Additionally, the proposed rule, as written, is arbitrary; one court could always allow appearances through counsel and another never, which will yield a lot of confusion for those who appear in multiple courts. Additionally, the pandemic is over, (I am not saying the virus disappeared.) we should relegate remote appearances in criminal cases to secondary and aim for in-person.

The second is CrRLJ 8.3. This proposed rule is insane. Under the law, as currently exists, both by the current CrRLJ 8.3 and the case law that supports it, there is a good balance which avoids abuse. First, under case law, it is clear that intent is not the standard, mismanagement is enough to find governmental misconduct. If the prosecution negligently overlooks some new discovery and has a late disclosure, it does come under the definition of government misconduct. If law enforcement loses a video recording, that could be seen as governmental misconduct. The balance is that, under the current rule, the defendant would have to show that the misconduct materially affects the defendant's right to a fair trial. In short, the courts have the tools already, to determine if the rules were violated and why, and whether the defendant are really being prejudiced in the presentation of his or her defense. Under this proposed rule, that balance is obliterated. If there is a pretrial order that says turn over discovery by such a

date, and it is negligently not turned over until the day after the deadline, I believe the rule could very well require dismissal, even if was conceded by everyone involved that the defendant would suffer no prejudice.

One can argue that the rule still uses the word "may" implying discretion. That does not change my concerns. First, the framework on how a court should exercise its discretion is gone, if this proposed rule gets adopted. Second, why amend the rule at all, in the way that it is being proposed, if not to get cases dismissed for merely negligently not complying with the rule, and ditching the requirement that a defendant show prejudice?

The third is CrRLJ 4.7. This also is problematic. I have no problem with the idea that unrepresented defendants need to have access to discovery. The problem is that the discovery may contain information that it is not appropriate for the defendant to have. As an example, let's assume that the charge is indecent exposure to children. Would one think it wise to give the discovery to the defendant, thus providing addresses, phone numbers, etc. to the children alleged as victims? The proposed rule contains verbiage about the court establishing local rules for redacting. Do you really believe that a court will come up with rules to cover each and everything that may happen? The current rule covers this well. The prosecutor's office has to approve of the redactions before the discovery is handed to the defense. If there is a dispute, it can be brought up in court. Judges are more than capable to set the rules on a case-by-case basis, balancing the need to keep some information confidential to the defendant and to allow the defendant to participate in the putting together and presenting her or his defense.

In summary, I strongly oppose these revisions. I want to be clear that these are my positions, and I am not speaking on behalf of anyone else. I am looking at the other proposals as well and if I have comments, I will send them.

Sincerely,

George A. Steele

P.S. Mr. Dorcy and Mr. Jones, I am sending you a courtesy copy of my comments to keep you informed and I am attaching copies of the rules.

CrRLJ 4.7
DISCOVERY

(a)-(f) [Unchanged.]

(g) Regulation of Discovery.

(1)-(2) [Unchanged.]

(3) *Custody of Materials.* Any materials furnished to a ~~lawyer~~ defendant and/or attorney pursuant to these rules shall remain in the exclusive custody of the ~~lawyer~~ defendant and/or attorney and be used only for the purposes of conducting the party's side of the case, unless otherwise agreed by the parties or ordered by the court, and shall be subject to such other terms and conditions as the parties may agree or the court may provide. ~~Further, a defense lawyer shall be permitted to provide a copy of the materials to the defendant after making appropriate redactions which are approved by the prosecuting authority or order of the court. Further, each Municipal, District and Superior Court shall, through the local rule-making process under CrR/CrRLJ 1.7, publish guidelines for redactions within three months of adoption of this rule. Defense counsel may redact discovery consistent with these guidelines and provide a copy of the discovery to the accused. Each defense attorney shall maintain a duplicate copy of discovery furnished to the represented defendant that show the redactions made in accordance with this court rule. The duplicate copy of discovery with redactions shall be kept in the defendant's case file for the duration of the case.~~

(A) A prosecutor attorney may motion the court for an order to modify redactions beyond the court's published guidelines by scheduling a hearing within seven days of the discovery being provided to defense counsel to address what additional redactions beyond their guidelines are required.

(B) A defense attorney may motion the court for an order to modify redaction conditions.

(4)-(7) [Unchanged.]

**CrRLJ 3.3
TIME FOR TRIAL**

(a) General Provisions.

(1)-(2) [Unchanged.]

(3) *Definitions.* For purposes of this rule:

(i)-(ii) [Unchanged.]

~~(iii) “Appearance” means the defendant’s physical presence in the trial court. Such presence constitutes appearance only if (A) the prosecutor was notified of the presence and (B) the presence is contemporaneously placed on the record under the cause number of the pending charge.~~

~~(iv)~~ (iii) “Arraignment” means the date determined under CrRLJ 4.1(b).

~~(v)~~ (iv) “Detained in jail” means held in the custody of a correctional facility pursuant to the pending charge. Such detention excludes any period in which a defendant is on electronic home monitoring, is being held in custody on an unrelated charge or hold, or is serving a sentence of confinement.

~~(vi)~~ (v) “Trial court” means the court where the pending charge was filed.

(4)-(6) [Unchanged.]

(b) [Unchanged.]

(c) Commencement date.

(1) [Unchanged.]

(2) *Resetting of commencement date.* On occurrence of one of the following events, a new commencement date shall be established, and the elapsed time shall be reset to zero. If more than one of these events occurs, the commencement date shall be the latest of the dates specified in this subsection.

(i) [Unchanged.]

(ii) *Failure To Appear.* The failure of the defendant to appear for any proceeding at which the defendant’s ~~presence~~ appearance was required. The new commencement date shall be the date of the defendant’s next physical appearance, remote appearance, or appearance through counsel in the court’s discretion. The prosecutor shall be notified of the appearance and the appearance must be contemporaneously placed on the record under the cause number of the pending charge.

(iii)-(viii) [Unchanged.]

(d) Trial Settings and Notice—Objections—Loss of Right ~~to~~ Object.

(1) *Initial Setting of Trial Date.* The court shall, within 15 days of the defendant's actual arraignment ~~in~~ by the trial court or at the pretrial hearing, set a date for trial ~~which~~ that is within the time limits prescribed by this rule and notify counsel for each party of the date set. If a defendant is not represented by counsel, the notice shall be given to the defendant and may be mailed to the defendant's last known address. The notice shall set forth the proper date of the defendant's arraignment and the date set for trial.

(2)-(4) [Unchanged.]

(e) [Unchanged.]

(f) Continuances. Continuances or other delays may be granted as follows:

(1) *Written Agreement.* Upon written agreement of the parties, which must be signed by defense counsel or the defendant or all defendants, the court may continue the trial date to a specified date. In the absence of the defendant's signature or ~~presence~~ remote or physical appearance at the hearing, defense counsel's signature constitutes a representation that the defendant has been consulted and agrees to the continuance. The court's notice to defense counsel of new hearing dates constitutes notice to the defendant.

(2) [Unchanged.]

(g)-(h) [Unchanged.]

CrR 3.2
RELEASE OF ACCUSED

If the court does not find, or a court has not previously found, probable cause, the accused shall be released without conditions.

(a) [Unchanged.]

(b) Showing of Likely Failure ~~to~~ Appear—Least Restrictive Conditions of Release. If the court determines that the accused is not likely to appear if released on personal recognizance, the court shall impose the least restrictive of the following conditions that will reasonably assure that the accused will be present for later hearings, or, if no single condition gives that assurance, any combination of the following conditions:

(1)-(3) [Unchanged.]

(4) Impose bail ~~Require the execution of a bond~~ in a specified amount and allow the accused to elect to satisfy the bail amount through any one of the following: the execution of a bond with sufficient sureties, a deposit of cash in lieu thereof, or by the deposit in the registry of the court in cash or other security as directed, of a sum not to exceed 10 percent of the amount of the bond, such deposit to be returned upon the performance of the conditions of release, less court costs not to exceed \$50 or forfeited for willful violation of any condition of release. ~~If this requirement is imposed, the court must also authorize a surety bond under section (b)(5);~~

~~(5) Require the execution of a bond with sufficient solvent sureties, or the deposit of cash in lieu thereof;~~

~~(6)~~ (5) Require the accused to return to custody during specified hours or to be placed on electronic monitoring, if available; or

~~(7)~~ (6) Impose any condition other than detention deemed reasonably necessary to assure appearance as required. If the court determines that the accused must post a secured or unsecured bond, the court shall consider, on the available information, the accused's financial resources for the purposes of setting a bond that will reasonably assure the accused's appearance.

(c) [Unchanged.]

(d) Showing of Substantial Danger—Conditions of Release. Upon a showing that there exists a substantial danger that the accused will commit a violent crime or that the accused will seek to intimidate witnesses, or otherwise unlawfully interfere with the administration of justice, the court may impose one or more of the following nonexclusive conditions:

(1)-(5) [Unchanged.]

(6) Require the accused to post a secured or unsecured bond or deposit cash in lieu thereof, conditioned on compliance with all conditions of release. This condition may be imposed only if no less restrictive condition or combination of conditions would reasonably assure the safety of the community. If the court determines under this section that the accused must post a secured or unsecured bond, the court shall consider, on the

available information, the accused's financial resources for the purposes of setting a bond that will reasonably assure the safety of the community and prevent the defendant from intimidating witnesses or otherwise unlawfully interfering with the administration of justice; if the court imposes bail, the court shall permit the accused to satisfy the bail amount in accordance with (b)(4).

(7)-(10) [Unchanged.]

(e)-(o) [Unchanged.]

Comment

[Unchanged.]

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amount in accordance with (b)(4).

(7)-(10) [Unchanged.]

(e)-(q) [Unchanged.]

CrR 8.3
DISMISSAL

(a) [Unchanged.]

(b) **On Motion of Court.** The court, in the furtherance of justice, after notice and hearing, may dismiss any criminal prosecution due to arbitrary action or governmental misconduct ~~when there has been prejudice to the rights of the accused which materially affect the accused's right to a fair trial.~~ The court shall set forth its reasons in a written order.

(c) [Unchanged.]

Comment

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**CrR 4.7
DISCOVERY**

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