



WASHINGTON
DEFENDER
ASSOCIATION

110 Prefontaine Pl. S., Suite 610
Seattle, WA 98104
www.defensenet.org

Christopher Swaby, President
Christie Hedman, Executive Director

February 27, 2020

By Email and 1st Class U.S. Mail

Susan L. Carlson
Clerk of the Supreme Court
P.O. Box 40929
Olympia, WA 98504-0929
supreme@courts.wa.gov

Dear Madam Clerk, Chief Justice Stephens and Members of the Supreme Court,

The Washington Defender Association (WDA) writes to express strong support of proposed General Rule 38 and to offer proposed amendments. We join a statewide coalition of legal services and community-based organizations requesting the Court to adopt this rule to restore access justice for all Washington residents.

Representing this statewide coalition, WDA and our partner Northwest Justice Project (NJP) proposed GR 38 to provide necessary protections for noncitizens exercising their right to access our courts to defend against criminal charges, seek protections, pay fines and conduct other business. GR 38 also ensures effective administration of justice and furthers public safety.

Suggested Amendments to GR 38 and Conclusion

Since the GR 38 petition was filed in October 2019, WDA, NJP and other coalition members engaged further with justice system stakeholders, including judges, clerks, legal experts, and community members. Those discussions identified the need for a few clarification amendments to ensure GR 38's effectiveness. These amendments reflect important changes identified by judges from the Minority and Justice and Gender and Justice Commissions, the Attorney General's Office and others. The proposed amendments are included below.

WDA's Interest In GR 38

Public defenders represent noncitizens throughout Washington who must access our courts daily. With a statewide membership of over 1400, the Washington Defender Association is the collective voice of the public defense community. We work to improve the quality of indigent defense and provide support for high quality legal representation. WDA advocates for systemic

change, educates defenders, and collaborates with the community and justice system stakeholders. In 1999, WDA created the Immigration Project to defend and advance the rights of noncitizens accused of crimes and noncitizens facing the immigration consequences of convictions. Since inception, WDA's Immigration Project has provided assistance in over 25,000 public defense cases, conducted over 250 trainings and participated in litigation, legislative and policy efforts to protect and expand the rights noncitizens in Washington's justice system.

DHS Activity At Courthouses Prevents Noncitizen Defendants From Exercising Their Fundamental Right of Access To The Courts And Interferes With Constitutional Guarantees

In 2014 the Obama Administration implemented federal immigration enforcement priorities focused on apprehension and deportation of noncitizens convicted of the most serious crimes. As a result, apprehensions and deportations by Immigration & Customs Enforcement (ICE) and Customs and Border Protection (CBP) dropped to levels not seen since 2008 and significantly reduced the climate of fear facing the 11 million undocumented people in the US.

In January 2017, the Trump Administration revoked the Obama enforcement priorities, and ordered *any* undocumented person to now be a priority target for deportation.¹ Within weeks, immigration agents began arresting and deporting people, predominantly people of color, in record numbers. Washington courthouses became a target of immigration enforcement operations. Since January 2018 there have been hundreds of civil courthouse arrests.²

Noncitizen defendants are *required* to come to court. Failure to appear means facing additional criminal charges that trigger the most severe immigration consequences.³ Defenders must assist their clients to grapple with a Hobbesian choice: appear for court to answer criminal charges and risk apprehension by ICE or CBP; or don't appear and risk conviction and likely deportation. The Hobbesian nature of this choice is illustrated by the father of four children, (one with a disability), who appeared at Kitsap District Court to address minor driving violations and instead ended up in the ICE detention center in Tacoma facing deportation.⁴

Immigrant defendants across Washington State are very aware that immigration agents are arresting people in and around courthouses and know first-hand how these arrests compromise their Constitutional rights. Circumstances often require defenders to advise clients at court. Plain clothed ICE agents have been documented listening into client attorney communications,

¹ Executive Order 13767: *Border Security and Immigration Enforcement Improvements*, January 25, 2017.

² See *State of Washington v. Dept. of Homeland Security* Case 2:19-cv-02043 Document 1 Filed 12/17/19; Email from Bronia Ashford, Chief of Tribal Affairs, CBP Off. Of Intergovernmental Pub. Liaison, to Prof. Angelina Snodgrass Godoy, Dir., Univ. of Wash. Ctr. for Human Rights (Nov. 25, 2019, 08:47 PST) (on file with WDA). We believe this number is much higher. However, documentation is difficult as people are apprehended without notice and often into the deportation system and already overburdened organizations have limited capacity to track arrests across the state.

³ A conviction for failure to appear for a felony or gross misdemeanor offense is classified as an aggravated felony under immigration law. See 8 USC 1101(a)(43)(Q) and (T). Such a conviction cuts off eligibility for virtually all avenues of relief from removal, thus making deportation all but certain.

⁴ See <https://www.kitsapsun.com/story/news/local/2019/12/07/man-arrested-ice-outside-kitsap-courthouse-free-bail/2613128001/>

interfering with the Sixth Amendment right to effective assistance of counsel.⁵ These actions also compromise Fifth Amendment due process rights where defendants feel compelled to plead guilty, regardless of the strength of their defense, in order to avoid returning to court in the future and risk arrest by immigration agents.

Civil immigration arrests and the obstacles they place in the path to accessing justice in our courts run directly counter to Washington’s well-established legal framework that places a premium on guaranteeing such access. Article 1, section 10 of the Washington state constitution provides that “justice in all cases shall be administered openly and without unnecessary delay.”⁶ This includes the right of access to seek legal redress in the courts.⁷ The right of meaningful access to the courts is particularly important when the courts are the only mechanism to settle a dispute.⁸

WDA requests this court to address the access to justice crisis created by immigration enforcement in and around courthouses by adopting GR 38 as amended below.

Christie Hedman

Respectfully submitted,
Christie Hedman
Executive Director, Washington Defender Association

Amy Hirotaki, Washington Association of Criminal Defense Lawyers
Anita Khandelwal, King County Department of Public Defense
Patrick O’Connor, Thurston County Public Defender
Dan McGreevy Bellingham Public Defender
Michael Kowamura, Pierce County Public Defender
Harry Gasnick, Clallam County Public Defender
Starck Follis, Whatcom County Public Defender
Adam Ballout, ABC Law Group (Everett Public Defenders)
Gregory C. Link, Director, Washington Appellate Project
Kathleen Kyle, Director, Snohomish County Public Defender Association
Jeremy Ford, Director, Counsel of Defense of Chelan
Melissa MacDougall, Indigent Defense Contract Administrator, Okanagan County
Thad Scudder, Director, Cowlitz County Office of Public Defense
Paul Kelley, Director, Yakima County Department of Assigned Counsel

⁵ See civil rights complaint filed by the Northwest Immigrant Rights Project 4/3/18 at <https://www.nwirp.org/civil-rights-complaint-filed-against-ice-officers-who-detained-man-after-eavesdropping-on-attorney-client-discussion-at-state-courthouse/>

⁶ Const. Art. 1 § 10.

⁷ *King v. King*, 162 Wn.2d. 378, 388, 174 P.3d 659 (2007); *see also State v. Vance*, 29 Wash. 435, 70 P. 34 (1902) (recognizing the “right to the usual remedies to collect debts, and to enforce other personal rights” as fundamental rights protected under the Washington constitution’s privileges and immunities clause).

⁸ *See, e.g., Whitney v. Buckner*, 107 Wn.2d 861, 866, 734 P.2d 485 (1987) (recognizing a constitutional right of access to the courts for the purpose of dissolving marital relationships). *State ex. rel. Taylor v. Dorsey*, 81 Wn. App. 414, 421, 914 P.2d 773, 777 (1996) (persons required to settle disputes through the judicial process must be afforded “meaningful access” to the courts).

Keith Tyne, Director, Skagit County Public Defender
Richard Davies, Director, Jefferson Associated Counsel
Tom Kryzminski, Director, Spokane County Public Defender
Kathy Knox, Spokane City Public Defender
Peter Jones, Chief Defender, Mason County
Lisa Daugaard, Executive Director, Public Defender Association

PROPOSED AMENDMENT LANGUAGE TO PETITION GR 38
COURT RULE PROHIBITION ON CIVIL ARRESTS

Proposed amendment language in red:

1. No person shall be subject to civil arrest without a judicial arrest warrant or judicial order for arrest while the person is inside a court of law of this state in connection with a judicial proceeding or other business with the court.
2. No person shall be subject to civil arrest without a judicial arrest warrant or judicial order for arrest while the traveling to a court of law of this state for the purpose of participating in any judicial proceeding, accessing services or conducting other business with the court, or while traveling to return home or to employment after participating in any judicial proceeding, accessing services or conducting business with the court. Participating in a judicial proceeding includes, but is not limited to, participating as a party, witness, interpreter, attorney or lay advocate. Business with the court and accessing court services includes, but is not limited to, doing business with, responding to, or seeking information, licensing, certification, notarization, or other services, from the office of the court clerk, financial/collections clerk, judicial administrator, courthouse facilitator, family law facilitator, court interpreter, and other court and clerk employees.
3. Washington courts may issue writs or other court orders necessary to enforce this court rule. **Unless otherwise ordered, the civil arrest prohibition extends to within one mile of a court of law. In an individual case, the court may issue a writ or other order setting forth conditions to address circumstances specific to an individual or other relevant entity.**

For purposes of this rule:

- A. **“Court of law” means any building or space occupied or used by a court of this state and adjacent property, including but not limited to adjacent sidewalks, all parking areas, grassy areas, plazas, court-related offices, commercial spaces within buildings or spaces occupied or used by a court of this state, and entrances to and exits from said buildings or spaces.**
- B. **“Court Order” and “Judicial Warrant” include only those warrants and orders signed by a judge or magistrate authorized under Article III of the United States Constitution or Article IV of the Washington Constitution or otherwise authorized under the Revised Code of Washington. Such warrants and orders do not include civil immigration warrants or other administrative orders, warrants or subpoenas that are not signed by a judge or magistrate as defined in this section. Civil immigration warrant means any warrant for a violation of federal civil immigration law issued by a federal immigration authority and includes, but is**

not limited to, administrative warrants issued on forms I-200 or I-203, or their successors, and civil immigration warrants entered in the national crime information center database.

- C. “Subject To Civil Arrest” includes, but is not limited to, stopping, detaining, holding, questioning, interrogating, arresting or delaying individuals by state or federal law enforcement officials or agents acting in their official capacity.

From: [OFFICE RECEPTIONIST, CLERK](#)
To: [Tracy, Mary](#)
Subject: FW: Comments - Proposed GR 38
Date: Thursday, February 27, 2020 3:29:34 PM
Attachments: [022720 FINAL WDA Comments Proposed GR 38 Court Rule.pdf](#)

From: Ann Benson [mailto:abenson@defensenet.org]
Sent: Thursday, February 27, 2020 3:26 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Subject: Comments - Proposed GR 38

Ms. Carlson,

Attached please find comments for submission from the Washington Defender Association regarding proposed rule GR 38.

Please contact me with any questions.

Regards, Annie Benson

Annie Benson, (she/her)
Senior Directing Attorney



www.defensenet.org

From: [OFFICE RECEPTIONIST, CLERK](#)
To: [Tracy, Mary](#)
Subject: FW: Comments - Proposed GR 38
Date: Thursday, February 27, 2020 3:31:38 PM

From: Ann Benson [mailto:abenson@defensenet.org]
Sent: Thursday, February 27, 2020 3:31 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Subject: RE: Comments - Proposed GR 38

Ms. Carlson,

Please note that WDA is the primary proponent of GR 38. As the comments attached to my prior email indicate, we are requesting the Court to amend the language of the original rule. We are submitting these amendments on behalf of the statewide coalition putting forward the rule. The amendments have been circulated to, and acknowledged by, many groups who have already commented. I wanted to alert you to the fact that the actual amendment language is attached to the WDA comment letter.

Regards, Annie

Annie Benson, (she/her)
Senior Directing Attorney



www.defensenet.org

From: Ann Benson
Sent: Thursday, February 27, 2020 3:26 PM
To: supreme@courts.wa.gov
Subject: Comments - Proposed GR 38

Ms. Carlson,

Attached please find comments for submission from the Washington Defender Association regarding proposed rule GR 38.

Please contact me with any questions.

Regards, Annie Benson

Annie Benson, (she/her)
Senior Directing Attorney



www.defensenet.org