WASHINGTON COURTS

District and Municipal Court Judges' Association

January 30, 2023

VIA EMAIL

Honorable Steven C. González
Chief Justice of the Washington State Supreme Court

Honorable Charles W. Johnson
Honorable Mary I. Yu
Washington Supreme Court Rules Committee Co-Chairs

Re: Request for Emergency Stay of CrRLJ 7.6

Dear Chief Justice González, Justice Johnson and Justice Yu,

The DMCJA Board of Governors voted unanimously to request a stay of the amendments to CrRLJ 7.6 for the reasons outlined in our November 28, 2022 letter to the Supreme Court Rules Committee.

The DMCJA membership continues to believe the amended rule is unworkable, and we renew our request for an emergency stay of the rule.

The DMCJA Rules Committee has solicited comments from the DMCJA to highlight the concerns and confusion our members have with this amended rule. We have included relevant portions of the comments we have received. We expect to have more specific examples as courts continue to interpret and apply the impracticable requirements of the new rule.

Please let us know if we may provide additional information as you consider commentary from all relevant stakeholders.

In conclusion, we respectfully reaffirm our request for an emergency stay of the amended CrRLJ 7.6.

Sincerely.

Judge Catherine McDowell
DMCJA Rules Committee Co-Chair

Judge Wade Samuelson
DMCJA Rules Committee Co-Chair

Attachment

cc: Judge Rick Leo, DMCJA President
Antoinette Bonsignore, DMCJA Rules Committee Staff
Stephanie Oyler, DMCJA Primary Staff

Comments from DMCJA Member Courts re: new CrRLJ 7.6

- Stephen Rochon (King County Municipal Court): Implementing amended CrRLJ 7.6 will be difficult enough for full-time courts. Part-time courts will be unable to meet the time requirements in many/most cases. Accountability for sentence noncompliance will be severely compromised.

- Judge Anneke Berry (Buckley Municipal Court): Here in Buckley, the time constraints of the rule are very challenging. We have two and a half court days scheduled each month (with alternating months for jury trial), and we fit as much into those days as possible. Twenty-four hours/next judicial day can be quite a difference in our court, especially where it is left undefined. As is, it would suggest that the court shall not modify or revoke probation except when a defendant is present and the parties stipulate. The rule does not allow revocation without the parties' stipulation or only allows revocation by stipulation when the defendant isn't present.

- Judge Angelle Gerl (Spokane County Municipal Court: Airway Heights): This rule creates a right to a probation hearing within 14 days for someone in custody. The rule fails to provide a provision to stay this timeframe when a 10.77 Competency evaluation is ordered. In contrast, CrRLJ 3.3 provides for a stay of speedy trial. RCW 10.77 will not stay the 14-day time frame. The rule must address this, as a hearing cannot always be held within 14 if a competency evaluation is pending.
  - ➢ CrRLJ 7.6(c) provides that the defendant has a right to be physically present at "any hearing where the prosecution seeks to detain the defendant." It is unclear whether this provides a right to be physically present on an initial bail hearing under section (d) of the rule. If the prosecutor requests that the bond be maintained, is this what the rule means in stating "prosecution seeks to detain the defendant"? Or does this only apply when the prosecution seeks

to detain a defendant who is not in custody? Is the court required to transport all persons from the jail the next judicial day for a bail hearing *just in case* the prosecution wants to maintain the bond? The court does not know whether a prosecutor will ask to detain a defendant. How is the court to know when to order transport? For many courts, the jail is not connected to the court. In some smaller jurisdictions, the City contracts with the county jail. A police officer must drive from the City to the jail to pick up a transport, bring it to court, and then drive them back for the hearing. There are limits on the number of people transported at one time. The result is that transporting persons in custody for an initial bail hearing would take an officer away from their duties for a minimum of 2 hours in our court. Our law enforcement agencies are already drastically understaffed. If the rule intends to impose a right to be physically present only at a contested show cause but not for the initial bail hearing, it would be helpful to clarify that.

➢ The rule has confused many courts concerning the phrase "before a probation hearing, the probationer shall be advised of the nature of the alleged violation and provided discovery…" in section (f). Courts are confused as to who is obligated to provide this information. Probation is an arm of the court under the Administrative Rules for Courts of Limited Jurisdiction. Discovery is typically a function of the prosecution. The rule is unclear.

- Judge Andrea L. Beall (Puyallup Municipal Court): My impression from the original proposal was concern amongst defense lawyers that persons could be held without bail for extended periods or held on bail; they cannot post for an excessive period of time. The current version, while trying to address those concerns, has caused a lot of confusion for courts . . . .

  ➢ It seems to have been the drafters' intent to codify due process protections of notice and an opportunity to be heard in Section (f). However, the final

version of the rule has created confusion. It should be clarified the evidence is required before the revocation or modification of probation and not necessarily required where there is a stipulation to a violation. While defendants should have an opportunity to be heard and the right to challenge the evidence of a violation, the 3-day time frame for demanding cross-examination is an unrealistic time frame for the issuance of subpoenas. Additionally, the rule makes scheduling difficult in many courts, as additional time would be required for any testimonial hearing.

- Judge Kara Murphy Richards (Renton Municipal Court): The rule uses the words "physically present." At many meetings over recent months, there has been much discussion about "presence" being satisfied if the individual is present via zoom or another virtual platform. The use of the words "physically present" suggests we are now expected to transport every defendant who contests their revocation physically. This will significantly burden each jurisdiction regarding transport costs and calendar management. The presence requirement must be satisfied when the defendant is present in person or virtually.

  - ➢ There was a lot of discussion about the fact that presumed innocent people can be held for 48 hours for a bail hearing, but someone who has to plead guilty is entitled to a bail hearing within 24 hours. How is that fair?

  - ➢ How does 10.77 impact prescribed times? There is no mention in the rule to suggest that the defined timelines are extended or stayed when there is a 10.77 evaluation pending. Who is responsible for providing the discovery to the defendant, the court, or the prosecutor?

  - ➢ The three-day rule. When does the defendant's three-day entitlement to call witnesses to commence, the day their bail hearing is set? The day they announce they are contesting the allegations? Three days doesn't allow the

City/State to subpoena witnesses properly. Does the defendant only get to cross-examine the witnesses that the prosecution has called, or does the defendant have the right to demand that the officer also be present in every case. . . .

➢ Does the rule apply to warrant bookings for a failure to appear revocation hearing? When a defendant is booked on a warrant for failing to appear for a revocation hearing, do these tight turnarounds apply?

- Judge Aimee N. Maurer (Spokane County District Court): Under CrRLJ 7.6 (f) Rights of Defendant Unless Waived: it states, "Before a probation hearing, the probationer shall be advised of the nature of the alleged violation *and provided discovery of evidence supporting the allegations including names and contact information of the witnesses.*" In discussions with my Bench the consensus is that "discovery" is a legal term that applies to the "parties." Thus, some judges have argued that the probation department/officers are not obligated to provide any discovery, but rather the State must provide the discovery.

  ➢ However, the prosecutor assigned to the District Court is arguing that it is the Probation Department's responsibility. I think the concern is that the State does not possess/control/maintain "discovery" such as treatment records, urinalysis results, etc.

  ➢ Likewise, there have been concerns about how treatment records and urinalysis results (i.e., medical record results) should be provided. If it is the State's burden of production, then how does the State get those medical/treatment records? Should probation officers give those records to the State, which then provides them to the defendant? This seems problematic not only because it isn't very efficient but also because that would require the Probation Department to give to the adverse party (i.e., the State)

the defendant's medical/treatment records which that adverse party will now use as evidence against the defendant.

➢ Or should probation officers be giving those records directly to the defendant? While I support the proposition of the probation officers providing those records directly to the defendant (they are the defendant's own medical/treatment records, and like any medical record, they should have full access to those records). However, as written, the rule creates tension for probation officers to determine what is "evidence" and provide "discovery," which is traditionally and legally provided or disclosed by the parties.

➢ In addition, there are concerns about the Probation Department being directed to provide "evidence or discovery" of unredacted police reports and/or National Crime Information Center (NCIC) histories (as it was a review of a defendant's NCIC that showed a new criminal charge from out of State and that is what formed the basis of a violation) there is no limiting language as to the requirement to disclose evidence or discovery of information that is otherwise not allowed to be disclosed.

➢ It might be advisable to rewrite the rule to state something like, "*Before a probation hearing, the probationer shall be advised of the nature of the alleged violation and provided, by the Probation Department, copies of any documentation or information, unless their disclosure is prohibited under State or Federal Law, which supports and/or establishes the alleged probation violation, including names and contact information of witnesses.*" Or something along those lines. This does not create an undue hardship because the introduction to Section (f) states, "Rights of the Defendant *Unless Waived,*" so it would only apply to those probationers who do not want to waive.

- ➢ I know there have been some other challenges to this rule by smaller jurisdictions, but for Spokane County, this is the extent of the concerns from our Bench, as I understand them. Thank you in advance for your consideration and willingness to hear from the Courts of the DMCJA.

- Judge Megan Valentine (Grays Harbor District Court): In Grays Harbor District Court, we have two full-time judges allowing us to have one judge for criminal matters and one judge for civil matters, and one courtroom for each; this is not the situation for smaller municipal courts in our county. Our County public defenders are contracted with the county and are not full-time employees available to appear every day of every week. Thus, our criminal court alternates weeks between hearings and trials. Our current practice is, when a person appears after an arrest for an alleged probation violation, to provide them with an attorney if they qualify and schedule a hearing to determine if they admit or deny the allegation and if they need a hearing on the allegation. The new CrRLJ 7.6 will require we forgo an admit/deny hearing and that the matter be immediately set for a testimonial hearing within two weeks. The attorney will have a maximum of two weeks and likely far less time to be notified they have been assigned to the case and defendant, to obtain discovery and review it with their client, and to provide three days prior notice to the State and Court if they demand to have witnesses present.

  - ➢ The new CrRLJ 7.6 will make it essentially impossible for the court to set bail on any person accused of a probation violation. Our public defenders only appear in our court one day in a two-week period. In all likelihood, the attorney will not have time to schedule with the jail to meet with their client three days before the hearing. Thus, all defendants will be forced to request a continuance or proceed without the opportunity to discuss the matter with their attorney and consider it before the hearing. If the allegation is a currently pending criminal charge, this puts an even more significant burden

on the defendant to make a decision of constitutional magnitude - whether to have a hearing within the two weeks or request a continuance so that they may preserve their Fifth Amendment rights.

➢ I am concerned about how our court can comply with this rule for any in-custody defendant. The time frame the rule establishes appears to be far shorter than any of our attorneys will likely be prepared to conduct a hearing, much less to facilitate the exchange of discovery between the prosecutor, the probation department, and the defense.

➢ We also act as the municipal court for the City of McCleary. The City has a contracted attorney appear once a month. With a once-a-month calendar, any defendant brought into custody on an allegation they have violated probation will always have to be released or held if the next court date is less than two weeks away. If they do not voluntarily appear at the next court hearing, the court can issue a warrant, but if they are arrested on the warrant, unless it is within two weeks of the next court date, they will again have to be released. We will increase warrants and arrests if we cannot set bail for longer than two weeks without a hearing. Setting bail is a last resort. It is the most restrictive condition, but our judges do not decide to set bail or issue a warrant lightly. Shortening the time for the parties to do their work will not improve justice, and it will increase court hearings. I do not believe this was the intended effect of this rule, but I think its application will have these unintended consequences.

- Judge Krista White Swain (King County Municipal Court, Black Diamond): As a municipal judge, this rule is highly confusing and inconsistent with the current practice of most district and municipal courts. We are scratching our heads about the various ways of interpreting it.

- George A. Steele (Mason County District Court): . . . In one way, this prejudices defendants. If you are charged with a new crime, do you want a speedy resolution of the probation matter where the new crime is the allegation within two weeks? Most of the time, the State can get ready faster than the defense. There is no Constitutional prohibition to no bail holds after conviction. Does this rule impose such a prohibition or merely require a similar analysis?

From:	OFFICE RECEPTIONIST, CLERK
To:	Martinez, Jacquelynn
Subject:	FW: DMCJA Request for Emergency Stay of CrRLJ 7.6
Date:	Tuesday, January 31, 2023 8:59:39 AM
Attachments:	DMCJA Request for Emergency Stay of CrRLJ 7.6_01302023.pdf image002.png

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From: Dugas, Tracy <Tracy.Dugas@courts.wa.gov>
Sent: Monday, January 30, 2023 5:01 PM
To: Gonzalez, Justice Steve <J_S.Gonzalez@courts.wa.gov>; OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Cc: Lipford, Ashley <Ashley.Lipford@courts.wa.gov>; 'rick.leo@snoco.org' <rick.leo@snoco.org>; Oyler, Stephanie <Stephanie.oyler@courts.wa.gov>; 'Wade Samuelson' <Wade.Samuelson@lewiscountywa.gov>; 'McDowall, Catherine' <Catherine.McDowall@seattle.gov>; 'Goodwin, Jeffrey' <Jeffrey.Goodwin@snoco.org>; Bonsignore, Antoinette <Antoinette.Bonsignore@courts.wa.gov>
Subject: DMCJA Request for Emergency Stay of CrRLJ 7.6

Greetings,

Please see attached letter sent on behalf the DMCJA Rules Committee Co-Chairs.

Thank you,

Tracy Dugas
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