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April 22, 2022

VIA EMAIL

Honorable Charles W. Johnson
Honorable Mary I. Yu
Supreme Court Rules Committee
c/o Clerk of the Supreme Court
Temple of Justice
PO Box 40929
Olympia, WA 98504-0929

RE: Comment on Proposed Amendment to CrRLJ 7.6

Dear Justice Johnson, Justice Yu, and Rules Committee Members:

On behalf of the District and Municipal Court Judges' Association (DMCJA), I am writing with concerns regarding the Washington Defender Association (WDA)'s proposal to amend CrRLJ 7.6, pertaining to probation. If the revisions provided below are not incorporated into the proposal, we urge the Committee to reject the proposed amendments.

The proposed amendment would significantly alter the current procedural requirements for probation review hearings. Much of the proposed new language is supported by existing State and Federal law and is not objectionable. However, some portions of the proposal change existing Washington State law and add substantive and procedural requirements for probation review hearings.

The DMCJA has the following specific concerns:

- New subsection (b): The DMCJA does not oppose a transfer or consolidation of probation matters within the State of Washington. Transfer of probation matters outside of the State of Washington is governed by the Interstate Compact for Adult Offender Supervision (ICAOS) pursuant to Chapter 9.94A RCW. This rule should clarify the distinction between

transferring probation within and outside of the State of Washington.

- Added language to subsection (c): “The defendant has the right to be physically present at all hearings. The court has discretion to allow the defendant to appear through counsel or remotely.” A defendant has a due process right to be present for a probation review hearing. *Morrissey v. Brewer*, 408 U.S. 471 (1972); *State v. Nelson*, 103 Wn.2d 760 (1985). The minimal due process rights identified in *Morrissey* and *Nelson*, which were decided before video conference hearings were widely available, include the right to be heard in person and to present witnesses and evidence. This proposal goes one step further and would establish a right to be physically present at all probation hearings.

  In most cases when a probation violation has been alleged, the court conducts a preliminary hearing where the defendant is advised of the nature of the violation and either admits or denies the allegation. If the allegation is denied, the matter is set for a fact-finding hearing. Facilitating the right of an out-of-custody probationer to be physically present at all probation hearings is not problematic. Not so with in-custody defendants.

  Many courts of limited jurisdiction (CLJs) use video conferencing for in-custody hearings. The GR 9 cover sheet supporting this amendment acknowledges that some probation review hearings are ministerial and appearances remotely or through counsel are appropriate. This addition to CrRLJ 7.6 would require corrections staff to transport in-custody defendants from the jail to court for all probation review hearings. The GR 9 cover sheet does not address what minimal due process protection requires an in-custody probationer to be transported to court in lieu of a video conference appearance.

- New subsection (e): “If a defendant is held in custody on the alleged probation violation, the court must hold a probation hearing in which the defendant has the right to be physically present within two weeks of the defendant's arrest unless the defendant requests a continuance.” The DMCJA opposes this addition to CrRLJ 7.6. Issues surrounding an in-custody probationer’s right to be physically present have been addressed above. The DMCJA doesn't disagree that probation review hearings, particularly for in-custody defendants, should be timely conducted. However, we have concerns about how this proposal would be applied and whether CLJs across the state can comply with a two-week timeline.

  The proposal does not consider the probation review hearing process used in CLJs. As stated above, these hearings are typically bifurcated with a preliminary hearing to determine whether the allegation is disputed. Many allegations of probation violations are not disputed and do not require an evidentiary hearing. Disputed matters are then set for evidentiary fact finding. CLJs in smaller jurisdictions do not have regularly scheduled calendars. If this proposal is implemented, these smaller jurisdictions would have to add court days, incurring a relatively high expense, as it would require local governments to provide prosecutors for evidentiary fact finding hearings.

The DMCJA also has concerns that, regardless of jurisdictional size, the requirement of a fact-finding hearing for in-custody probationers within two weeks is impractical. Probation departments will need to refer all discoverable information to prosecutors who will then need to disseminate that information and subpoena any necessary witnesses. If the preliminary hearing satisfies the requirement that 'a hearing' be held within two weeks and that a fact-finding hearing can be set outside two weeks, that may be possible for most jurisdictions. We note that the proposed rule does not provide a consequence for failing to hold a hearing within two weeks.

- New subsection (f): "The defendant is entitled to be represented by a lawyer, and a lawyer shall be appointed for a defendant financially unable to obtain one. Before a probation hearing, the court or prosecutor shall apprise the defendant of the nature and evidence of the alleged violation and the names and contact information of witnesses the court or prosecutor intends to call. At the hearing, the defendant shall have the right to present evidence and cross-examine witnesses. The defendant shall have the right to confront adverse witnesses unless the court specifically finds good cause for not allowing confrontation. If the court revokes probation, it must issue a written statement as to the evidence it relied on and the reasons for revocation." The rights set forth in this subsection are generally provided for in both *Morrissey* and *Nelson*; the DMCJA does not oppose most of this section. However, the DMCJA objects to the manner in which the confrontation right is presented and the requirement for written findings.

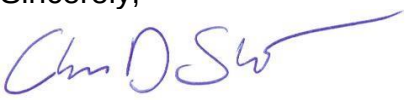
  Current Washington State case law establishes that any objection to hearsay is an asserted right. *See*, *e.g.*, *State v. Nelson*, 103 Wn.2d 760 (1985); *State v. Robinson*, 120 Wn. App. 294 (2004). The way this rule is written requires the Court to undertake the analysis addressed in *Nelson* and *State v. Dahl*, 139 Wn. 2d 678 (1999), regarding good cause to forgo live testimony for hearsay, in every case whether asserted by the probationer or not. This will result in longer hearings and will likely require additional probation review calendars. The proponent's GR 9 cover sheet does not address what minimal due process protection this shift from an asserted right to a court requirement would provide.

  Finally, the DMCJA objects to the requirement of a written order. Current Washington State case law specifically permits an oral record. *State v. Dahl*, 139 at 689. The CrRLJs also specifically permit oral rulings on the record in several instances. CrRLJ 6.1.2(a) permits an oral record following a bench trial. CrRLJ 3.5(c) permits an oral record following a hearing regarding statements attributed to the defendant. CrRLJ 3.6(b) permits an oral record following suppression motions. Nothing in the current version of CrRLJ 7.6 requires a written order. The reason for that is, unlike Superior Court, we do not have law clerks to assist in the drafting of those orders. Nothing in the existing rules cited here prevents either party from reducing the Court's oral ruling to a written order and presenting a proposed written order to the Court.

For these reasons, the DMCJA opposes the WDA proposal to amend CrRLJ 7.6 unless modified in accordance with these comments.

Thank you for your consideration.

Sincerely,



Judge Charles D. Short
DMCJA President

cc: Judge Jeffrey Goodwin, DMCJA Rules Chair
Ms. J Benway, DMCJA Rules Staff

From:	OFFICE RECEPTIONIST, CLERK
To:	Linford, Tera
Subject:	FW: Comment Letters (11) re CrRLJ 7.6, CrRLJ 3.1, CJC 2.3, CrRLJ 2.1, CRLJ proposal, GR 26, GR 42, APR 9, CJC 2.2 & 2.6, CrR 3.3, and Nonbiased Language Proposal
Date:	Tuesday, April 26, 2022 8:06:57 AM
Attachments:	DMCJA Cmt Ltr re CrRLJ 7.6 April 22, 2022.pdf DMCJA Cmt Ltr re CrRLJ 3.1 April 22, 2022.pdf DMCJA Cmt Ltr re CJC 2.3 April 22, 2022.pdf DMCJA Cmt Ltr re CrRLJ 2.1 April 22, 2022.pdf DMCJA Cmt Ltr re CRLJ proposal April 22, 2022.pdf DMCJA Cmt Ltr re GR 26 April 26, 2022.pdf DMCJA Cmt Ltr re new GR 42 April 22, 2022.pdf DMCJA Cmt Ltr re APR 9 April 22, 2022.pdf DMCJA Cmt Ltr re CJC 2.2 and 2.6 April 22, 2022.pdf DMCJA Cmt Ltr re CrR 3.3 April 22, 2022.pdf DMCJA Cmt Ltr re nonbiased language proposal April 22, 2022.pdf image002.png

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From: Dugas, Tracy
Sent: Monday, April 25, 2022 5:25 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Cc: 'Charles D Short' <cshort@co.okanogan.wa.us>; 'Goodwin, Jeffrey' <Jeffrey.Goodwin@snoco.org>; Benway, Jennifer <Jamanda.Benway@courts.wa.gov>; Oyler, Stephanie <Stephanie.oyler@courts.wa.gov>
Subject: Comment Letters (11) re CrRLJ 7.6, CrRLJ 3.1, CJC 2.3, CrRLJ 2.1, CRLJ proposal, GR 26, GR 42, APR 9, CJC 2.2 & 2.6, CrR 3.3, and Nonbiased Language Proposal

Greetings,

Please see the attached letters intended as comments on the proposed amendments to CrRLJ 7.6; CrRLJ 3.1; CJC 2.3; CrRLJ 2.1; the CRLJ proposal; GR 26; GR 42; APR 9; CJC 2.2 & 2.6; CrR 3.3; and the Nonbiased Language Proposal, sent on behalf of Judge Charles D. Short, DMCJA President.

Thank you,

Tracy Dugas (she/her)
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WASHINGTON COURTS