

WSR 22-01-112
RULES OF COURT
STATE SUPREME COURT
[December 6, 2021]

IN THE MATTER OF THE ) ORDER
SUGGESTED AMENDMENTS TO ) NO. 25700-A-1409
CrRLJ 7.6—PROBATION )

The Washington Defender Association, having recommended the suggested amendments to CrRLJ 7.6—Probation, and the Court having approved the suggested amendments for publication;

Now, therefore, it is hereby

ORDERED:

(a) That pursuant to the provisions of GR 9(g), the suggested amendments as shown below are to be published for comment in the Washington Reports, Washington Register, Washington State Bar Association and Administrative Office of the Court's websites in January 2022.

(b) The purpose statement as required by GR 9(e), is published solely for the information of the Bench, Bar and other interested parties.

(c) Comments are to be submitted to the Clerk of the Supreme Court by either U.S. Mail or Internet E-Mail by no later than April 30, 2022. Comments may be sent to the following addresses: P.O. Box 40929, Olympia, Washington 98504-0929, or supreme@courts.wa.gov. Comments submitted by e-mail message must be limited to 1500 words.

DATED at Olympia, Washington this 6th day of December, 2021.

For the Court

Gonzalez, C.J.

CHIEF JUSTICE

GR 9 Cover Sheet

Suggested Changes to CrRLJ 7.6

(A) Name of Proponent: Washington Defender Association

(B) Spokesperson: Magda Baker, Misdemeanor Resource Attorney, Washington Defender Association; Email: magda@defensenet.org; Phone: (206) 226-9512

(C) Purpose: In 2020, there were 54,538 criminal charges that ended in convictions in Washington courts of limited jurisdiction.1 The sentences of many of those convicted included probation.2 Courts of limited jurisdiction have long had great leeway when imposing conditions of probation. See Spokane v. Farmer, 5 Wn.App. 25, 29, 486 P.2d 296 (1971) (court could set "such conditions [of probation] as bear a reasonable relation to the defendant's duty to make reparation, or as tend to prevent the future commission of crimes"). Given the number of people on probation, the wide discretion courts have when supervising them and the grave impact of incarceration, CrRLJ 7.6 should provide more guidance about imposing and revoking probation. The Washington Defender Association proposes changes to CrRLJ 7.6 that would protect probationers before and during revocation hearings and a change that would give courts discretion to transfer the jurisdiction of probation under certain circumstances.

1 Caseloads of the courts of Washington, Courts of limited Jurisdiction, Misdemeanor Activity – 2020 Annual report. https://www.courts.wa.gov/caseload/?fa=caseload.showReport&level=d&freq=a&tab=Statewide&fileID=cityr

<sup>2</sup> See RCW 3.66.068 (allowing district courts to impose up to two or five years of probation depending on the crime); RCW 35.20.255 (allowing municipal courts for cities with a population over four hundred thousand to impose up to two or five years of probation depending on the crime); RCW 3.50.330 (allowing all other municipal courts to impose up to two or five years of probation depending on the crime).

We suggest a change to subsection (b) that would secure the right of probationers to be physically present at probation hearings and also give courts discretion to allow remote appearances and appearances through counsel. Courts often conduct proceedings during which they merely continue cases to gather evidence or wait for the outcome of another case. The proposed change would make clear that courts may excuse probationers from such hearings.

The changes in proposed subsections (d) would allow more probationers to be released from jail before their revocation hearings. Current subsection (b) says courts "may" use the pretrial release factors in CrRLJ 3.2 to release probationers or set bail pending their revocation hearings. That wording allows some courts to hold probationers in jail until their hearings without setting bail. Proposed subsection (d) would *require* courts to consider release and bail, limiting disruption to the lives of many probationers.

Proposed subsection (e) would further limit disruptions to the lives of probationers by requiring courts to hold probation hearings for those in jail on alleged violations within two weeks of their arrests. Courts often revoke small amounts of suspended or deferred time when punishing probation violations, and this proposed change would help ensure that people who cannot post bail do not serve more time in jail than is appropriate for their violations. This proposed amendment would limit RCW 9.95.230,<sup>3</sup> which now allows courts to revoke or modify probation "at any time prior to the entry of an order terminating it." See *State v. Alberts*, 51 Wn.App. 450, 754 P.2d 128 (1988) (interpreting RCW 9.95.230 as allowing a court to hold a probation revocation hearing even after the time for probation had expired).

<sup>3</sup> RCW 9.95.230 states:

The court shall have authority at any time prior to the entry of an order terminating probation to (1) revoke, modify, or change its order of suspension of imposition or execution of sentence; (2) it may at any time, when the ends of justice will be subserved thereby, and when the reformation of the probationer shall warrant it, terminate the period of probation, and discharge the person so held.

Proposed subsection (f) lists rights of probationers in revocation hearings, including the right to counsel set out in current CrRLJ 7.6(b) and constitutional due process rights. It would not expand existing rights, simply codify them. See *Gagnon v. Scarpelli*, 411 U.S. 778, 93 S.Ct. 1756, 36 L.Ed. 2d 656 (1973); *In re Boone*, 103 Wn.2d 224, 230, 691 P.2d 964 (1984). Noting these rights a court rule would help ensure participants in probation hearings recognize and protect them.

Proposed subsection (b) would allow one court of limited jurisdiction to transfer probation to another court nearer to where a probationer lives, works or attends school if the probationer requests that and both courts agree. People are sometimes arrested for misdemeanors in jurisdictions far from where they live because they are traveling for work, family visits or vacations. Travel back to the jurisdiction of conviction for probation appointments and hearings can be difficult due to work, school and childcare obligations and limited access to transportation.

**(D) Hearing:** None recommended.

**(E) Expedited Consideration:** Expedited consideration is not requested.

**Reviser's note:** The typographical error in the above section occurred in the copy filed by the agency and appears in the Register pursuant to the requirements of RCW 34.08.040.

[Suggested changes to CrRLJ 7.6]

CrRLJ 7.6 PROBATION

**(a) Probation.** After conviction of an offense the defendant may be placed on probation as provided by law.

**(b) Jurisdiction.** The court may, at its discretion, authorize the probation department of a different court to supervise the defendant if (i) the defendant so requests, (ii) the supervising court approves, and (iii) the supervising court is located in a county where the defendant resides, works or attends school.

**(c) Revocation or Modification of Probation.** ~~The court shall not revoke or modify probation except (1) after a hearing in which the defendant shall be present and apprised of the grounds on which such action is proposed, or (2) upon stipulation of the parties. The defendant is entitled to be represented by a lawyer and may be released pursuant to rule 3.2 pending such hearing. A lawyer shall be appointed for a defendant financially unable to obtain one.~~ 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.

**(d) Release Pending Probation Hearing.** If the defendant has been arrested for an alleged probation violation, the court shall release the defendant or set bail pursuant to rule 3.2 pending a probation hearing.

**(e) Timing of Probation Hearing.** 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.

**(f) Rights of the Defendant Unless Waived.** 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.