

WSR 25-02-015
RULES OF COURT
STATE SUPREME COURT
[December 5, 2024]

IN THE MATTER OF THE) ORDER
SUGGESTED AMENDMENTS TO CrR) NO. 25700-A-1620
3.2/CrRLJ 3.2—RELEASE OF)
ACCUSED)

The King County Department of Public Defense, the Washington State Office of Public Defense, the Washington Defender Association, and the Snohomish County Office of Public Defense, having recommended the suggested amendments to CrR 3.2/CrRLJ 3.2—Release of Accused, 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 2025.

(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, 2025. 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 5th day of December, 2024.

For the Court

Gonzalez, C.J.

CHIEF JUSTICE

GR9 COVER SHEET

A. Name of Proponent: The King County Department of Defense, the Washington State Office of Public Defense, the Washington Defender Association, and the Snohomish County Office of Public Defense.

B. Spokesperson: Matt Sanders, Larry Jefferson, Christie Hedman, and Jason Schwarz.

C. Purpose: Revise CrR/CrRLJ 3.2 to clarify the confusing and broad language regarding "administration of justice" and replace it with the specific and clear inquiry into whether a person may unlawfully intimidate with or threaten a witness, victim or court participant, or tamper with evidence.

D. Public Hearing: A public hearing is not recommended.

E. Expedited Consideration: Expedited consideration is not requested.

F. Supporting Material: Suggested rule amendment.

Introduction

The King County Department of Public Defense, the Washington State Office of Public Defense, the Washington Defender Association, and the Snohomish County Office of Public Defense propose changes to

CrR/CrRLJ 3.2 to bring greater clarity to the factors that the trial court may consider when imposing pretrial conditions of release. Instead of an unduly broad criterion of "interference with the administration of justice", the proposed amendment will ensure the trial court properly considers whether a person will seek to intimidate or threaten witnesses, victims, and court employees or seek to tamper with evidence.

Background

Under CrR/CrRLJ 3.2, a court may impose conditions of release when the court finds there is a likely danger that the accused... will seek to intimidate witnesses, or otherwise unlawfully interfere with the administration of justice," but the rule does not define "administration of justice." This lack of clarity undermines the presumption of release, as the State has successfully argued that factors as commonplace as past failures to appear constitute likely interference with the administration of justice.

We have seen the state argue and the court impose bail after finding that a person is likely to commit a *nonviolent offense* and thus violate release conditions, which would undermine the "administration of justice." In addition, increasingly often, when examining the interference with the "administration of justice" prong, courts consider whether a person has previously violated conditions of release, even if the violations were unrelated to any behavior towards witnesses, court employees, victims or evidence.

While there is little appellate caselaw interpreting the "administration of justice" prong of CrR/CrRLJ 3.2, in *State v. Rose*, the Court of Appeals applied a broad interpretation, writing that "no evidence in Wentz's case supported that he would be likely to commit a violent crime or intimidate a witness... Accordingly, the only remaining possibility is that the trial court found there was a likely danger that Wentz would 'otherwise unlawfully interfere with the administration of justice'... we presume that failing to attend a hearing is an unlawful interference with the administration of justice." 146 Wn. App. 439, 454, 191 P.3d 83, 91 (2008).

By clarifying the "administration of justice" prong to focus on whether a person will seek to intimidate or threaten witnesses, victims or court employees, or tamper with evidence, the Court can focus the inquiry and mitigate the risk that conditions of release like unaffordable bail are unnecessarily imposed. This is critical because the harms of unaffordable bail and pretrial incarceration are well known, with research demonstrating that that short periods of incarceration frequently upend a person's employment, housing, child custody, and access to health care.¹

In addition, greater clarity regarding the "administration of justice" prong is also important because studies demonstrate that both the imposition and effect of bail are racially disproportionate.² The racial disproportionality of the bail system has additional, far-reaching impacts due to the deleterious impact that pretrial incarceration has on case outcomes.³

Conclusion

The "administration of justice" prong must be clarified given the known harms of pretrial incarceration that result when unaffordable bail is imposed. Through this proposed amendment, the trial court will still be able to consider whether a person is likely to tamper with evidence or intimidate or threaten witnesses, victims, or court employees.

1 See Lisa Foster, *Judicial Responsibility for Justice in Criminal Courts*, 46 Hofstra L. Rev. 21 (2018).
 2 See Cynthia E. Jones, "Give Us Free": *Addressing Racial Disparities in Bail Determinations*, 16 N.Y.U.J. Legis. & Pub. Pol'y 919 (2013).
 Black defendants face higher bail amounts than white defendants charged with the same crimes. See Shawn Bushway & Jonah Gelbach,
 National Science Foundation, *Testing for Racial Discrimination in Bail Setting Using Nonparametric Estimation of a Parametric Model*
 (2011), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1990324.
 3 See Arpit Gupta, Christopher Hansman, Ethan Frenchman, *The Heavy Costs of High Bail: Evidence from Judge Randomization*, 45 J. Legal
 Stud. 471, 472 (2016) ("We find that the assessment of money bail is a significant, independent cause of convictions and recidivism.").

Proposed Amendments to CrR 3.2 and CrRLJ 3.2

**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) Presumption of Release in Noncapital Cases.

Any person, other than a person charged with a capital offense, shall at the preliminary appearance or reappearance pursuant to rule 3.2.1 or CrRLJ 3.2.1 be ordered released on the accused's personal recognizance pending trial unless:

- (1) the court determines that such recognizance will not reasonably assure the accused's appearance, when required, or
- (2) there is shown a likely danger that the accused:
 - (a) will commit a violent crime, or
 - (b) ~~will seek to intimidate witnesses, or otherwise unlawfully interfere with the administration of justice. will seek to intimidate or threaten a witness, victim or court employee, or tamper with evidence.~~

For the purpose of this rule, "violent crimes" are not limited to crimes defined as violent offenses in RCW 9.94A.030.

In making the determination herein, the court shall, on the available information, consider the relevant facts including, but not limited to, those in subsections (c) and (e) of this rule.

(b) - (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 will seek to intimidate or threaten a witness, victim or court employee, or tamper with evidence, ~~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 or threatening a witness, victim or court participant, or tampering with evidence;~~

(7)-(9) [unchanged]

(10) Impose any condition other than detention to assure ~~noninterference with the administration of justice~~ that the accused will not threaten or intimidate witnesses, victims or court employees, or tamper with evidence, and reduce danger to others or the community.

(e) Relevant Factors—Showing of Substantial Danger. In determining which conditions of release will reasonably assure ~~the accused's noninterference with the administration of justice that the accused will not threaten or intimidate witnesses, victims or court employees, or tamper with evidence,~~ and reduce danger to others or the community, the court shall, on the available information, consider the relevant facts including but not limited to:

(1)-(4) [unchanged]

(5) The accused's past record of threats to victims or witnesses, ~~or interference with witnesses or the administration of justice;~~ victims or court employees, or tampering with evidence;

(6) [unchanged]

(7) The accused's past record of committing violent offenses while on pretrial release, probation or parole or record of committing offenses that relate to the likelihood of interfering or threatening a witness or tampering with evidence; and

(8) [unchanged]

(f) [unchanged]

(g) Release in Capital Cases. Any person charged with a capital offense shall not be released in accordance with this rule unless the court finds that release on conditions will reasonably assure that the accused will appear for later hearings, will not intimidate or threaten witnesses, victims or court employees, or tamper with evidence significantly interfere with the administration of justice and will not pose a substantial danger to another or the community. If a risk of flight, interference or danger is believed to exist, the person may be ordered detained without bail.

(h) - (o) [unchanged]

CrRLJ 3.2 RELEASE OF ACCUSED

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

(a) Presumption of Release in Noncapital Cases. Any person, other than a person charged with a capital offense, shall at the preliminary appearance or reappearance pursuant to rule 3.2.1 be ordered released on the accused's personal recognizance pending trial unless:

(1) the court determines that such recognizance will not reasonably assure the accused's appearance, when required, or

(2) there is shown a likely danger that the accused:

(a) will commit a violent crime, or

(b) ~~will seek to intimidate witnesses, or otherwise unlawfully interfere with the administration of justice.~~ will seek to intimidate or threaten a witness, victim or court employee, or tamper with evidence.

For the purpose of this rule, "violent crimes" may include misdemeanors and gross misdemeanors and are not limited to crimes defined as violent offenses in RCW 9.94A.030.

In making the determination herein, the court shall, on the available information, consider the relevant facts including, but not limited to, those in subsections (c) and (e) of this rule.

(b) - (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 will seek to intimidate or threaten a witness, victim or court employee, or tamper with evidence, 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 or threatening a witness, victim or court participant, or tampering with evidence;

(7)-(9) [unchanged]

(10) Impose any condition other than detention to assure noninterference with the administration of justice that the accused will not threaten or intimidate witnesses, victims or court employees, or tamper with evidence, and reduce danger to others or the community.

(e) Relevant Factors—Showing of Substantial Danger. In determining which conditions of release will reasonably assure the accused's noninterference with the administration of justice that the accused will not threaten or intimidate witnesses, victims or court employees, or tamper with evidence, and reduce danger to others or the community, the court shall, on the available information, consider the relevant facts including but not limited to:

(1)-(4) [unchanged]

(5) The accused's past record of threats to victims or witnesses, or interference with witnesses or the administration of justice; victims or court employees, or tampering with evidence;

(6) [unchanged]

(7) The accused's past record of committing violent offenses while on pretrial release, probation or parole; and

(8) [unchanged]

(f) [unchanged]

(g) Release in Capital Cases. Any person charged with a capital offense shall not be released in accordance with this rule unless the court finds that release on conditions will reasonably assure that the accused will appear for later hearings, will not intimidate or threaten witnesses, victims or court employees, or tamper with evidence significantly interfere with the administration of justice and will not pose a substantial danger to another or the community. If a risk of flight, interference or danger is believed to exist, the person may be ordered detained without bail.

(h)-(q) [unchanged]

Reviser's note: The typographical errors in the above material occurred in the copy filed by the state supreme court and appear in the Register pursuant to the requirements of RCW 34.08.040.