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CRIMINAL DIVISION
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September 29, 2020

Supreme Court Rules Committee
Temple of Justice P.O. Box 40929
Olympia, WA 98504-0929
supreme@courts.wa.gov

Re: Proposed changes to CrR 3.4 and CrRLJ 3.4

Dear Supreme Court Rules Committee:

The City of Kent opposes the proposed changes to CrR/CrRLJ 3.4 – Presence of the Defendant. Specifically, there are four areas of critical concern detailed below. First, while the proposed rule change purports to decrease inefficiencies, for practical purposes it would do just the opposite. Second, the stated purpose of the rule indicates a desire to lessen the burden imposed on low or moderate income defendants, but in actuality, the rule would most benefit those defendants who have greater access to technological resources. Third, the proposed rule change potentially creates a greater risk of alleged RPC violations for defense counsel and increased litigation for claims of ineffective assistance of counsel. Fourth, we prosecute in a society that favors release of the accused with conditions both under CrR/CrRLJ 3.2 and ABA Standard 10-1.9, but these conditional releases are premised on an ability to supervise defendants and respond quickly to non-compliance with the conditions of release. Waiving presence at pre-trial hearings only defeats that purpose.

The stated purpose of the proposed rule change seems to suggest the only hearings of value are arraignment and trial. This is completely untrue. Most, if not all, critical case negotiation and trial preparation occurs at the pretrial hearing. At the time of arraignment, the court is addressing anywhere from 10-40 defendants during the course of a calendar; rights are reviewed, not-guilty pleas are entered and conditions of release are imposed without any meaningful discussion of the facts or review of

discovery at this early stage in the process. Undoubtedly critical, the arraignment is merely the first of many important hearings to come.

Kent Municipal Court complies with CrRLJ 4.5, which provides the court may set a pretrial hearing upon entrance of a not guilty plea. "The time set for the pretrial hearing should allow sufficient time for the lawyers to initiate and *complete discovery, conduct further investigation of the case as needed, and continue plea discussions.*" None of this can be accomplished without the defendant being present to discuss the facts of the case and plea negotiations with their attorney. It is the norm for there to be little to no contact between defense counsel and a defendant between hearings. Often times, a prosecutor will reach out to defense counsel to discuss the case and are met with an inability to proceed because counsel advises they will not have an opportunity to meet with their client before the next hearing. Additionally, there are numerous other tasks accomplished at pretrial hearings besides what is contemplated by CrRLJ 4.5, for which a defendant's presence is essential. For example: dispositive motions are addressed; issues for trial are defined or narrowed; deadlines are established for the parties to raise certain issues; collateral consequences are investigated; the need for an interpreter is determined; competency issues may be raised; charges or defendants may be joined; and charges may be amended. This list is not exhaustive.

If the proposed rule were to be adopted as written, the negative impact to the prosecutor's office, public defender's office, courts, jurors, and *most importantly* – the crime victim – would be monumental. The result of pre-trial hearings without a defendant present would create an abundance of cases being unnecessarily set to trial. The result is victims, witnesses and officers would be subpoenaed to appear and the prosecutor would be required to have their case ready to proceed to trial when there is little reason to believe the case might actually proceed. This includes expert witnesses whose time away from their work has a dramatic impact on society and the criminal justice system to include: forensic interviewers, hospital employees, WSP toxicologists, etc. Inevitably, there will be a defense motion to continue so the public defender can track down defense witnesses or do other necessary investigation following a conversation with their client. The trial date will become the functional equivalent of a

pretrial hearing except victims, witnesses and officers will be subpoenaed and required to appear over and over again until the defense is ready to proceed to trial or resolve the case by way of guilty plea.

The proposed change presumes every defendant possesses adequate means of communication with counsel. When, in fact, this is rarely the case. In order to get the perceived benefit of waiving a constitutional right to be present, the defendant would be required to either physically meet with counsel to execute the waiver or to possess technology that would allow them to access and electronically sign an electronic document after consulting with counsel. The very people intended to benefit from this proposed rule change likely would not have the resources to take advantage of the proposed flexibility.

In Kent, approximately 90% of defendants are represented by court appointed counsel. This population is often without a reliable or consistent phone number and/or residence. Court appointed counsel relies on the mutual presence in court not only to establish but to maintain adequate lines of communication throughout the pendency of the case. They rely on these hearings to identify issues, discuss strategy and possible resolutions. While this circumstance is not limited to court appointed counsel cases, it is, in our experience, exacerbated for indigent defendants.

Of late, our court has made adjustments to our normal operating procedures due to the COVID-19 pandemic. As a result ZOOM hearings have become available in certain circumstances for the convenience of the defendant and defense counsel. Nearly all such hearings have been for cases in which the defendant is represented by private counsel. The utilization of this technology has clearly advantaged those with advantage.

Handling criminal cases without the accused present for those hearings risks creating extra litigation or appeals over what decisions were made by counsel on the defendant’s behalf and could further expose defense counsel to RPC 1.6 violations and/or claims of ineffective assistance of counsel.

Currently, our courts engage in a colloquy with defendants when considering a motion to continue, a guilty plea, or entry into a stipulated order of continuance, because they are all instances in which the defendant is giving up or waiving certain rights. In all instances, counsel presents the proposed document to the court and advises the court they have explained said document to their client and this is how the defendant wishes to proceed. The bench then turns to the defendant to confirm that information. It is not uncommon for the defendant to advise the court that they are confused or not sure how they want to proceed. If the defendant is not present, this check on a defendant's constitutional rights will not be happening. Without it, how much litigation will be had over whether a given defendant made a knowing, intelligent and voluntary waiver of their constitutional right to be present?

> The purposes of the pretrial release decision include providing due process to those accused of crime, maintaining the integrity of the judicial process by securing defendants for trial, and *protecting victims, witnesses and the community from threat, danger or interference*.
>
> - American Bar Association (americanbar.org) (emphasis added).

Pre-trial release conditions may be imposed on a defendant not held on bail pursuant to CrR/CrRLJ 3.2. Release conditions are set to ensure the appearance of defendants and to protect crime victims, witnesses, and the community. The proposed changes to CrR/CrRLJ 3.4 regarding a defendant's presence would shift 3.2's purpose from ensuring due process and providing individual/public protection, to something that, while acknowledging pending criminal charges, ultimately makes a defendant's convenience the primary concern. These changes disregard the impact crime has on individuals and the public and reduces pre-trial release conditions to window dressing.

Having conditions in place that cannot be effectively monitored or modified by a court because requiring a defendant to appear for a hearing is too much to ask is just a bad idea. Although not punitive[1], pre-trial release conditions can be set only after a court finds probable cause a crime was committed. They may be modified if

[1] *Harris v. Charles*, 171 Wn.2d 455, 469, 256 P.3d 328 (2011).

a court finds there has been a change in circumstances, which includes violation of release conditions. The reality is defendants violate pre-trial release conditions, *e.g.* new law violations, violations of protective orders, continued alcohol or illegal drug use, etc., and when they do, individuals and/or the public are put at risk. If a defendant is excused from a pre-trial hearing because attending would be too disruptive for them, a court cannot effectively address violations, modify release conditions, or set/increase bail. The result is the defendant is not held accountable.

The public trusts the courts monitor out of custody defendants while cases await trial. If these proposed changes are adopted, then the public's trust would be undermined, and with it confidence in the criminal justice system. In sum, there is nothing about the proposed changes that would improve the criminal pre-trial process, they would simply make defendants less accountable to the court and the community.

The City of Kent urges you to reject the proposed changes to CrR 3.4 and CrRLJ 3.4. Thank you for your consideration.

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From:	OFFICE RECEPTIONIST, CLERK
To:	Linford, Tera
Cc:	Tracy, Mary
Subject:	FW: Proposed Changes to CrR3.4 and CrRLJ 3.4
Date:	Tuesday, September 29, 2020 11:12:23 AM
Attachments:	Comment to Proposed CrRLJ 3.4.pdf

From: Watson, Sara [mailto:SWatson@kentwa.gov]
Sent: Tuesday, September 29, 2020 11:03 AM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Subject: Proposed Changes to CrR3.4 and CrRLJ 3.4

To Whom it May Concern,

Please find the attached comments regarding the proposed changes to CrR 3.4 and CrRLJ 3.4 from the City of Kent Law Department.

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