From:	OFFICE RECEPTIONIST, CLERK
To:	Tracy, Mary
Subject:	FW: Comments to the Proposed Amendments to CrR 3.4 and CrRLJ 3.4
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From: Dolly Hunt [mailto:DHunt@pendoreille.org]
Sent: Monday, April 27, 2020 8:32 AM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Subject: Comments to the Proposed Amendments to CrR 3.4 and CrRLJ 3.4

Clerk of the Supreme Court of Washington,

Thank you for considering our opinions as it relates to the Washington Defenders Association's (WDA) proposed changes to CrR 3.4 and CrRLJ 3.4. These proposals which address the presence of a defendant in criminal court proceedings should be rejected because they fail to value the importance of a defendant's presence at significant court hearings. Implementing these proposals will demonstrate to defendants and victims of crimes that appearing in court is not important. This will result in more court congestion, more warrants, increased rates of incarceration and delayed justice for everyone, including defendants.

In 2018, this Court issued its opinion in *State v. Schierman*, 192 Wn.2d 577, 438 P.3d 1063 (2018). The Court analyzed Art. I, § 22 of the Washington State Constitution which guarantees a criminal defendant the right to "appear and defend in person." *State v. Schierman*, 192 Wn. 2d at 600. This ruling discussed the right of a defendant to be present at all stages of the criminal proceeding that are critical to its outcome if the defendant's presence would contribute to the fairness of the procedure. *Id*. Now, the Washington Defender Association seeks to avoid having a defendant appear for certain hearing because of the "disruptive impacts" of defendants participating the criminal court process. Failing to include Mr. *Schierman* in portions of the criminal justice process because it was easier and less disruptive for the court and counsel is the crux of the *Schierman* decision. To seek a change of the rules considering the holding in *Schierman* minimizes the importance of a defendant's presence in court and the critical guarantees of the Fourteen Amendment of the United States Constitution and the Washington State Constitution. The proposal should be rejected for these reasons.

Not requiring a defendant to appear for pretrial and status hearings allows a defendant to

disengage from the criminal process. This is likely to result in less motivation for a defendant to meet with or check in with his or her attorney which could lead to multiple trial settings, more court congestion, more warrants and greater levels of incarceration. In a recent meeting to address how our district court hoped to address court hearings in the aftermath of the COVID-19 virus pandemic, a veteran public defender explained that at any given time he is only able to maintain contact with roughly 10 % of his clients through phone contact or otherwise. He described how many of his clients do not consistently have access to reliable phone technology due to financial constraints. Many times the court hearing is the only time he is able to have contact with his clients. For this reason, it is hard to see how this proposal benefits any party, even defendants.

Victims will also disengage from the criminal process if this proposal is implemented. In our jurisdiction, many victims want to attend every court proceeding because the crimes committed against them are personal and important to them. Victims will be very disheartened and likely feel victimized again if they show up for a status or pretrial hearing only to learn that the alleged perpetrator of their crime was not required to be present.

It is important that a defendant appear for all status and pre-trial hearings, especially those in district court where the number of cases are much greater. Situations may occur where important information is communicated or unexpected matters are raised at the hearing. For instance, the State may become aware that a necessary witness is not available for the trial date. If the defendant is present at the hearing, it is possible the issue could be addressed at the hearing. If the defendant is not present, a new separate hearing or motion date would be required to address the request for a continuance. Similarly, the State might agree with a defense proposal to resolve a criminal matter. Should that occur, the matter could possibly be resolved if the defendant is present. If the defendant is not present, a second hearing would need to be scheduled to resolve the matter which could have been finalized at the initial hearing. This type of situation leads to further court congestion and obviates any benefit that might be derived from waiving a defendant's appearance for pretrial and status hearings.

Another problem with waiving the presence of a defendant between arraignment and trial is there is no way of knowing if a defendant has absconded from the jurisdiction in the intervening period. If it is too "disruptive" for a defendant to appear for court is it likely just as disruptive for a defendant to physically meet with the attorney. Thus, if an attorney only has phone contact with his

or her client, there is no way to verify that a defendant has not absconded. Not knowing whether a defendant has fled and will not be present for trial can result in the waste of limited resources for both the prosecution and defense. The time attorneys spend preparing for the trial, interviewing witness, and issuing subpoenas will all be for naught if a defendant has left the jurisdiction and never intended to appear for trial. It may take months or even years to locate a defendant that has fled.

WDA's proposal also discusses the use of a waiver to avoid a defendant from having to appear in court. Courts in Washington routinely analyze waivers for the imposition of coercive tactics in securing the waiver. WDA's proposal offers no ability to analyze whether a defendant was coerced into signing a waiver. Similarly, a defendant may challenge the waiver months or years later based upon alleged inaccurate or misinterpreted information. While it may sound very appealing to some defendants that all he or she has to do is sign a piece of paper to avoid appearing in court, the reality is some defendants may feel forced to sign a waiver when he or she may would really prefer to know all that is going on with their case. Demonstrating that a defendant made a knowing and voluntary waiver of his or her right when challenged at a later date will likely proven difficult at best.

Section (d) of WDA's proposal also requires a court to find "good cause" for a defendant to physically appear for any hearing outside of arraignment and the various parts of a trial. On its face, this language seems to suggest that a court must enter an order finding good cause before a defendant would need to physically appear for hearings such as a motion to revoke a defendant's release for a violating the terms of pretrial release, a hearing to address a probation violation, a show cause hearing or even a restitution hearing. Requiring such orders would clearly increase the present workload for the courts, the prosecution and defense.

In our jurisdiction, defense counsel routinely demands in-person interviews of the State's witnesses. They contend that being able to look the witness in the eye and "size" them up is necessary for a proper defense. Thus, for the defense to require witnesses to appear for in-person interviews while the court rules waive the presence of the defendant for pretrial and status hearings demonstrates to the defendant and others involved that these hearings are unimportant and lack significance. It is also fundamentally unfair that victims and witnesses must appear for in-person interviews based upon the benefits of the in-person observations while a person charged with a crime is not. Requiring the presence of a defendant for court hearings can bring to light such facts as that a defendant has started using or has relapsed into drug use or other important information.

This proposal fails to acknowledge the benefits of required court appearances while possibly causing defendants to further withdraw from the process. This may all lead to a defendant not appearing for other hearings including trial.

In closing, WDA's proposals are an attempt to make life easier for defense attorneys and their clients. The proposals seeks to eliminate ability for the court to issue bench warrants for defendants who routinely fail to appear for hearings. This Court should reject these proposals because they will lead to greater court congestion, more warrants and more incarceration due to defendant's believing that appearing for court is not quite as important as it used to be.

Sincerely,

Dolly N. Hunt