From: OFFICE RECEPTIONIST, CLERK
To: Linford, Tera
Cc: Tracy, Mary
Subject: FW: Comment on amendments to CrR 3.4 and CrRLJ 3.4
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From: Wise, Donna [mailto:Donna.Wise@kingcounty.gov]
Sent: Wednesday, September 30, 2020 1:05 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Subject: Comment on amendments to CrR 3.4 and CrRLJ 3.4

Re: Comment opposing proposed amendments to CrR 3.4 and CrRLJ 3.4

I have been practicing law in Washington for over 35 years, representing the people of the State. I oppose the proposed amendments to CrR 3.4 and CrRLJ 3.4 offered by the Washington Defender Association. While it is important to minimize unnecessary burdens on individuals who are charged with crimes, the amendments are over-simplistic, would seriously harm defendants by depriving them of critical information, and are contrary to the interests of justice.

If the proposed amendments are adopted, a defendant who signs a non-specific waiver of his or her right to appear need not appear in court after arraignment, until the trial begins. If the defendant's presence is necessary at any hearing before trial, the State will have to request that a court make a written finding that there is good cause to require the defendant's presence, requiring a pre-hearing hearing.

A waiver "indicating the defendant wishes to appear through counsel" will not establish a knowing, intelligent, and voluntary waiver of the defendant's constitutional right to appear at critical stages of criminal proceedings. There are hearings that are critical stages beyond those specified in proposed CrR 3.4(b), for example, most criminal motions. Even if a waiver of appearance specified a particular proceeding, unexpected subjects often are raised. If the waiver does not cover all subjects that arise on a particular date, an additional hearing will have to be set or reviewing courts later are likely to conclude that the defendant was deprived of his or her constitutional right to be present.

It is likely that defendants will challenge the validity of the waivers authorized by this rule based on alleged inaccurate advice about the nature of the proceedings at issue. Establishing the specific advice given years earlier by a defense attorney who represents many defendants is extremely difficult. Establishing that the defendant understood that advice and made a voluntary and intelligent waiver of the right to be present at a critical stage of the proceedings will be even more difficult. This will generate additional litigation and may result in reversals of convictions and the additional burden on victims and the criminal justice system when cases must be retried.

It is very common for defense counsel to request a continuance of the trial date at a hearing pretrial. It is important for the defendant to have an opportunity to hear and understand the basis for that request and to have an opportunity to object (also common) or make a record that he or she is validly waiving the right to a timely trial.

Prosecutors often provide notice of the State's intentions at interim case setting hearings and omnibus hearings. For example, notice is provided that the State will be amending or adding charges or making or revoking a plea offer. The court cannot ensure that the defendant has received a timely and accurate account of this critical information if the defendant is not in court at the time. It is very important that defendants understand the course of the proceedings as they occur. It will be difficult for defendants and the community to have faith in the openness of the process if hearings occur, offers are tendered, and motions are decided without the defendant present.

The rule is not limited to defendants who are out of custody. A broad waiver of the right to appear may be attractive to an in-custody defendant when court appearances seem to be a nuisance. A broad waiver of the right to appear also may be signed when a defendant is out of custody but the defendant is later taken into custody. It is critical that defendants who are in custody have every opportunity to communicate with their lawyer and with the court so they understand the course of the proceedings, including the reasons for any delays.

Finally, eliminating the need for defendants to appear between arraignment at trial will result in the State being unaware if a defendant has fled to avoid prosecution. That will result in a massive waste of resources as the court, the State, defense counsel, and witnesses prepare for a trial that cannot occur (wasting scarce time and money with court hearings, attorney preparation, witness interviews, issuance of subpoenas, and forensic testing). It also will result in delays in attempting to locate the defendant who has fled, making location of the defendant more difficult.

These amendments should be rejected – they will have a negative impact throughout the criminal justice system. The amendments are not time-limited to the pandemic response. While alternatives to appearance in person may be appropriate in many circumstances, that is not what is accomplished by these proposals.

Respectfully,

Donna Wise
Senior Deputy Prosecuting Attorney
King County Prosecutor's Office