September 30, 2020

The Honorable Charles Johnson, Chair
Supreme Court Rules Committee
Temple of Justice
PO Box 40929
Olympia, WA 98504-0929
VIA EMAIL

Dear Justice Johnson:

I write to encourage the Supreme Court to adopt the proposed amended rule to CrR 3.4 and CrRLJ 3.4. However, I encourage the Court to also include additional modifications consistent with this Court's recent Emergency Orders during COVID.

As the current Director of the Snohomish County Office of Public Defense and public defender for 13 years, I have been involved in both the leadership of public defenders as well as direct representation at all levels of our public defense system. I represent the Washington Defender Association on the Supreme Court's BJA COVID Trial Taskforce. I have also practiced in misdemeanors, adult felonies, appeals, juvenile court, therapeutic courts, dependencies, and child support proceedings. There is a stark contrast between the way our trial courts manage criminal and civil cases, to the detriment of criminal defendants and counsel. In civil cases, courts accommodate parties and counsel with flexible rules that respect the lives of the parties and respect the professionalism of counsel. Adopting this proposed rule conveys to parties in a criminal action the same trust and respect as those in civil actions.

The proposed rule accommodates the lives of defendants. Our criminal courts have, for too long, failed to acknowledge and accommodate the lived experiences of working and struggling defendants, many of whom are disproportionately Black, Indigenous, persons of color, indigent, or suffering from physical or mental health conditions that make court attendance challenging. I have countless tragic stories of clients who have suffered under the current version of CrR 3.4. A former client is serving a five-year sentence for bail jumping for missing court dates, which were made impossible by parenting obligations, lack of driver's license, and crippling mental illness. While he was acquitted of the offenses which originally brought him to court, he is being wrongly punished because his obstacles to attending court made his physical presence impossible. I also recall that another client lost his job and apartment because of repeated court appearances. The case was charged years after the alleged violations and the client was summonsed to appear from a remote state. When he received the summons, he was a man working a minimum-wage job in subsidized housing compliant with his mental health medications. He was too poor to afford airfare, and was unable to drive himself to court, so each hearing meant days of bus travel to and from Washington. Over two years of litigation, he missed so much work that he was terminated and eventually lost his housing. The current version of the draconian rule punishes defendants and radically impacts the lives of those scraping by and with little room for error. Allowing defendants to avoid being physically present at lengthy and repeated hearings accommodates the lives of those engaged with the courts and shows them the dignity they deserve. My time as a public defender has led me to believe that there is an implicit bias by judges, prosecutors, and even some defenders that defendants in criminal cases are irresponsible, untrustworthy, and seeking to avoid the court. This view is outdated,

disrespectful, and racist. The proposed rule change ameliorates the damage that these biases have on criminal defendants.

The proposed rule encourages lawyers and their clients to communicate prior to hearings. The proposed rule rewards attorneys and defendants who can negotiate and communicate on agreed orders prior to court hearings. The rule allows counsel and their clients to best determine a litigation timeline without the judicial management of often pointless, routine, and time-intensive hearings which fit only the Court's schedule. The rule will be a welcome efficiency to our courts. Opponents of the proposed rule argue that cases will not get resolved because defendants and defense counsel will never meet. These arguments presume defense counsel and their client do not communicate prior to court. As a 13 year public defender, please trust me when I say this presumption is false. There are always poor communicators. But the majority of persons are eager to work with counsel, despite hurdles to accessing justice. And defense counsel, while often burdened by heavy caseloads, are required by RPC 1.4 to communicate with their client. The proposed rule change rewards those who work to resolve their cases without excessive judicial micromanagement.

This proposed rule was a positive step before COVID; now it is essential. COVID has taught us that our trial courts can operate without defendants coming to court for repeated hearings. In Snohomish County, we have, since March, been allowing defendants to appear through counsel by local rule. In many cases, counsel file agreed orders prior to scheduled hearing for ex parte signature, thus eliminating the need for any hearing. In some cases, defense counsel appears for the defendant who is not present and makes a record about the prior communication and agreement between the parties. Zoom appearances have increased attendance at all hearings, including arraignments. Defendants have appeared in court from the water closets of their workplace, from their bedroom while hiding from their children, and from their car connecting to wi-fi from libraries and businesses. In Snohomish County, we have been able to move and resolve cases without the defendant in court with just as much efficiency as we were prior to COVID. COVID has destroyed the myth that defendants don't communicate with counsel. In fact, defendants have remained in touch with counsel *despite* the communication challenges and distance imposed by COVID. Because of the rule changes during COVID, attorneys are spending less time sitting in court and more time working their cases and communicating with their clients. During a recent BJA Taskforce meeting our county's elected prosecutor went on record supporting court rules not requiring the defendant's presence. He did so based on months of first-hand experience and the feedback from his attorneys.

I encourage this Court to adopt a modified version of this proposed rule which incorporates elements of this Court's emergency orders during COVID. I am aware of and support the modified version of the rule provided to this Court by Magda Baker of the Washington Defender Association.

COVID has taught us that trial courts can resolve cases without a defendant present for every routine hearing. Adopting the proposed rule would promote fairness, equity, and respect for both the lives of defendants and the work of counsel. I ask you to adopt the proposed rule with the modifications mentioned in Ms. Baker's letter.

Thank you for your time and consideration.

/s/

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