

From: [OFFICE RECEPTIONIST, CLERK](#)
To: [Tracy, Mary](#)
Subject: FW: Comments re proposed changes to CrR 3.4 and CrRLJ 3.4
Date: Tuesday, April 7, 2020 4:01:51 PM

From: Guthrie, Stephanie [mailto:Stephanie.Guthrie@kingcounty.gov]
Sent: Tuesday, April 7, 2020 3:56 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Subject: Comments re proposed changes to CrR 3.4 and CrRLJ 3.4

Hello,

I am writing to express my concern about the proposed changes to CrR 3.4 and CrRLJ 3.4, noted in bullet points below each proposed change.

CrR 3.4 PRESENCE OF THE DEFENDANT amendments

(a) Presence Defined. Unless a court order or this rule specifically requires the physical presence of the defendant, the defendant may appear through counsel. Appearance through counsel requires that counsel present a waiver the defendant has signed indicating the defendant wishes to appear through counsel.

- I routinely hear from public defenders that they have trouble reaching many of their clients outside of court. Many indigent defendants lack a stable address, some don't have a phone at all, and others have a phone but inconsistent ability to pay their phone bill, resulting in phone service sometimes being turned off for days or weeks. Court appearances sometimes provide the sole opportunities for defense attorneys to communicate with such clients. As currently written, the rule would allow a defendant to sign multiple waivers at the beginning of a case and then never communicate with defense counsel again, or to simply drop a signed waiver at their attorney's office without actually speaking with their attorney. Lack of communication between counsel and defendants delays any ability to negotiate a resolution.
- One of the biggest issues with the proposed rule is that it will make it possible for a defendant to hide the fact that they have fled to avoid prosecution until the day of trial. A defendant could submit multiple waivers to defense counsel at the beginning of the case, or submit waivers to defense counsel by email, and flee the state without the state or the court knowing it. This would result in a massive waste of resources as the State and defense counsel prepare for a trial that cannot occur (wasting scarce time and money with attorney preparation, witness interviews, issuance of subpoenas, and forensic testing). It also will result in delays (possibly months) in attempting to locate the defendant who has fled.
- Even if a defendant does not intentionally flee to avoid prosecution, because the rule facilitates defendants having less frequent contact with their attorneys, it will increase the number of defendants who fall out of touch with their attorneys and then miss their trial date.

- The rule is not limited to defendants who are out of 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. Under the proposed rule, if the prosecutor does not ask the court to require the defendant to be present, an in-custody defendant with a busy defense attorney might be left for months wondering what is going on in his or her case. In-custody defendants who are dissatisfied with their appointed counsel often use in-custody hearing as a way to easily and without warning bring issues of concern to the court's attention. Such hearings are often frustrating for defense attorneys and prosecutors, but important for the appearance of fairness in a defendant's mind, and because the defendant's presence wouldn't be required absent a finding of good cause, difficult defendants could be deprived of their opportunity to be heard by the attorneys not asking the court to require the defendant to be present.
- 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 the charges, or of the State's plea offer. There is no way to ensure that the defendant has received that notice 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 without the defendant present. If the proposed rule is enacted, it will likely lead to an explosion of claims of ineffective assistance of counsel in plea bargaining, because prosecutors will be deprived of their current ability to inoculate against that by putting plea offers on the record.
- This rule would require a separate hearing to obtain a court order to require the defendant's presence for any motion outside of trial. E.g. motion to compel production of DNA sample from defendant, motion to join cases for trial, motion to revoke bail. This pre-hearing hearing will be an additional burden on the attorneys and the court system and cause unnecessary delays.
- 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 date.
- 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), e.g. most motions.
- A waiver will have to be for a specific proceeding, but 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 courts will later determine that the defendant was deprived of his/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. Sometimes defense attorneys are no longer alive by the time a dispute about advice given is raised. Establishing that the defendant understood that advice and made a voluntary and intelligent waiver 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.

- If a defendant who is out of custody does not have to remain engaged in the court proceedings, he or she has an incentive to request repeated continuances of the trial date, resulting in congestion of the court system and prejudice to the State's ability to present its case as memories fade and witnesses become unavailable.
- The change would prevent defendants from establishing a record of appearing for court hearings, which can help them with later arguments regarding bail or sentencing requests that rely on their responsibility or stability.
- For defendants whose competency may be uncertain, it is important for the court and counsel to have ongoing opportunities to view and interact with the defendant to monitor their mental health.
- If some form of the proposed rule is enacted, it should be modified to require that the waiver be signed within seven days of the hearing and specify the date and subjects (in detail) of the hearing. This is necessary to ensure that the waiver is made with knowledge of the proceeding at issue.

(a) (b) When Necessary. ~~The defendant shall be~~ The court shall not proceed unless the defendant is physically present at the arraignment, at every stage of the trial including the empaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by these rules, or as excused or excluded by the court for good cause shown.

- This amendment would preclude appearances by live video feed, and there is no justification offered for that change.

(b) (c) Effect of Voluntary Absence. In the prosecutions for offenses not punishable by death, the defendant's voluntary absence after the trial has commenced in his or her presence shall not prevent continuing the trial to and including the return of the verdict. A corporation may appear by counsel for all purposes. In prosecutions for offenses punishable by fine only, the court, with the written consent of the defendant, may permit arraignment, plea, trial and imposition of sentence in the defendant's absence.

(c) (d) Defendant Not Present. The court shall require the defendant's appearance at arraignment, at every stage of trial, from the empaneling of the jury to the return of the verdict, and at the imposition of sentence. In order to require the defendant's physical presence at any other hearing, the court must find good cause as explained in a written order. If in any case the defendant is not present when his or her personal attendance is necessary, the court may order the clerk to issue a bench warrant for the defendant's arrest, which may be served as a warrant of arrest in other cases.

- The interplay between sections (a) and (d) is unclear and unworkable. If the court has not made a finding that the defendant's presence is necessary, is a waiver under (a) nevertheless necessary? If there is no need for a defendant to be present, why is a waiver necessary? If a finding of good cause has not been made, but a waiver has not been provided, what happens? Section (d) would seem to suggest the court cannot issue a warrant because the defendant's presence was not required, and yet without a waiver of the defendant's constitutional right to be present, the hearing cannot go forward without him. So the court would be forced to simply continue the hearing, yet there would be no way to ensure that the defendant ever gets notice of the new hearing.

- The requirement that a court justify mandating appearance by the defendant by “good cause explained in a written order” is unreasonable and will generate litigation regarding the finding of good cause as a basis to challenge the lawfulness of any warrant issued if the defendant fails to appear.
- The requirement of “good cause” suggests that defense counsel will be arguing against a requirement that the defendant be present, and to do so will minimize the significance of the hearing, which may mislead the defendant as to significance of the proceedings and affect the defendant’s ability to knowingly and voluntarily execute the waiver provided in proposed CrR 3.4(a).
- As noted above, 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.

(d) (e) Videoconference Proceedings.

(1)–(3) [Unchanged.]

(e) (f) Video Conference Proceedings under chapter 10.77 RCW.

(1)–(2) [Unchanged.]

Thank you,



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