



September 30, 2020

The Honorable Charles Johnson, Chair
Supreme Court Rules Committee
Temple of Justice
PO Box 40929
Olympia, WA 98504-0929
VIA EMAIL: SUPREME@COURTS.WA.GOV

Re: Comment on Suggested Changes to Superior Court Criminal Rule 3.4 and Criminal Rule for Courts of Limited Jurisdiction 3.4 in Light of this Court's Response to COVID 19

Dear Justice Johnson:

WDA submits this comment on our proposal that the Court amend CrRLJ 3.4 and CrR 3.4 to allow some criminal court hearings to proceed without a defendant's physical presence. We made our initial proposal in October of 2019, before the COVID 19 crisis began. Since that time, we have seen Washington courts adapt to the current dangers of in person court appearances with the guidance of emergency orders from this Court. That prompts us to slightly alter our original proposal.

This Court's emergency orders increase safety, efficiency, and fairness in three ways that are relevant to our proposal. First, they limit who must physically appear in court and allow trial courts to act on agreed orders and to conduct hearings by telephone, video, or other means that do not require in-person attendance. Second, the orders authorize trial courts to continue cases of defendants who are not physically present and expect those defendants will learn of new hearing dates from their attorneys. Finally, the orders permit some court actions that used to require defendants' signatures to proceed without paper forms. These changes have allowed trial courts to function more smoothly than they would otherwise during these difficult times.

Because of the success of the emergency orders, we now ask to slightly alter our initial proposal in order to adopt additional changes:

- We originally proposed that people charged with crimes be allowed to appear through counsel at hearings where their presence was not necessary. We now propose allowing either appearance through counsel *or remote appearance*.
- We originally left intact the requirement in CrR 3.4(b) and CrRLJ 3.4(b) that defendants be physically present at arraignment, trial, and sentencing. We now propose amending

those subsections to give trial courts discretion to allow defendants to appear remotely at those events.

- We originally proposed that defendants who wished to appear through counsel sign waivers that their attorneys would present to the court. We now ask you to amend CrRLJ 3.4(a) and CrRLJ 3.4(a) to allow counsel to either present the court with a signed waiver *or to affirm in writing or in open court that the client wishes to appear through counsel.*
- We propose streamlining the wording of CrR 3.4(d) and CrRLJ 3.4(d) that we originally suggested.

Attached to this comment are redlined versions of both our original proposal and the current rule with the changes we now envision.

We now know courts can function without forcing defendants to be physically present at every court hearing, including those that primarily address scheduling matters. Permanently adopting changes that reflect what we have learned would be fairer to those accused of crimes and streamline the court process by limiting the need for bench warrants and allowing hearings to run efficiently. We urge you to allow the flexibility about when defendants must physically appear to continue after courts are functioning normally again.

We ask that the Court adopt our current proposal without first publishing it and awaiting any new comments given the extraordinary change in procedures since COVID 19. The alterations we now seek incorporate sources that have been on the Court's website and subject to feedback for several months: our original proposal and the Court's emergency orders.

Please let us know if you have questions. Thank you for your time and consideration.

Sincerely,

A handwritten signature in black ink that reads "Magda Baker". The signature is written in a cursive, flowing style with a long horizontal stroke extending to the right.

Magda Baker, Misdemeanor Resource Attorney

CrR/CrRLJ 3.4
PRESENCE OF THE DEFENDANT

(a) Presence Defined. Unless a court order or this rule specifically requires the physical presence of the defendant, the defendant may appear **remotely or** through counsel. Appearance through counsel requires that counsel **either (i) present a waiver the defendant has signed indicating the defendant wishes to appear through counsel, or (ii) affirm, in writing or in open court, that this is the defendant's preference.**

~~(a)~~ **(b) When Necessary.** ~~The defendant shall be~~ The court shall not proceed unless the defendant is **physically** present **physically or remotely (in the court's discretion)** 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.

~~(b)~~ **(c) Effect of Voluntary Absence.** 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 its lawyer 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, 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 **or remote** presence at any **other** hearing **other than those listed in subpart (b),** 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.

~~(d)~~ **(e)** [unchanged]

~~(e)~~ **(f)** [unchanged]

CrR/CrRLJ 3.4
PRESENCE OF THE DEFENDANT

(a) Presence Defined. Unless a court order or this rule specifically requires the physical presence of the defendant, the defendant may appear remotely or through counsel. Appearance through counsel requires that counsel either (i) present a waiver the defendant has signed indicating the defendant wishes to appear through counsel, or (ii) affirm, in writing or in open court, that this is the defendant's preference.

~~(a)~~ **(b) When Necessary.** ~~The defendant shall be present~~ The court shall not proceed unless the defendant is present physically or remotely (in the court's discretion) at the arraignment, at every stage of the trial including the empanelling 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.

~~(b)~~ **(c) Effect of Voluntary Absence.** 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 its lawyer 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.** In order to require the defendant's physical or remote presence at any hearing other than those listed in subpart (b), 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.

~~(d)~~ **(e)** [unchanged]

~~(e)~~ **(f)** [unchanged]

From: [OFFICE RECEPTIONIST, CLERK](#)
To: [Linford, Tera](#)
Cc: [Tracy, Mary](#)
Subject: FW: comment on court rule proposal CrR 3.4 and CrRLJ 3.4
Date: Wednesday, September 30, 2020 3:17:35 PM
Attachments: [image002.png](#)
[image003.png](#)
[WDA Comment 3.4 rule proposal and COVID.pdf](#)

From: Magda Baker [mailto:Magda@defensenet.org]
Sent: Wednesday, September 30, 2020 3:16 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Subject: comment on court rule proposal CrR 3.4 and CrRLJ 3.4

Attached is one last comment from WDA regarding proposed changes to CrRLJ 3.4 and CrR 3.4.

Thank you for your time and attention!

Magda Baker
Misdemeanor Resource Attorney
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