Pierce County
Office of the Prosecuting Attorney

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September 10, 2020

Supreme Court Rules Committee
Temple of Justice
P.O. Box 40929
Olympia, WA 98504-0929
supreme@courts.wa.gov

Re: Proposed changes to CrR 3.4 and CrRLJ 3.4

Dear Supreme Court Rules Committee:

We urge you to reject the proposed changes to CrR 3.4 and CrRLJ 3.4, which would allow criminal defendants to waive their presence at most pretrial hearings except arraignment. The proposed rule change is well-intentioned, but making criminal court appearances optional will cause many unintended consequences and inefficiencies. If implemented, this rule will prevent courts from effectively managing their dockets, cause delay in the resolution of cases, force costly and unnecessary trial preparation, and create conflicts with defendants' right to be present at all critical stages of the trial process.

The proponents of this rule assert that it will allow the court system to function more efficiently, but the opposite is true. If defendants can waive their presence at all pretrial hearings, it will be virtually impossible for the state or court to determine whether defendants are still participating in the case at any given point prior to the scheduled trial date. Cases would be able to progress to trial without the court being able to verify whether the defendant is likely to appear – a primary reason for requiring defendants to be present at pretrial hearings. As a result, the state and court would have to expend additional resources preparing many cases for an unrealistic trial date. The ambiguity introduced by the proposed rule would cause cases to drift, rather than be resolved efficiently.

The proponents of this rule suggest that it is unnecessary for their clients to attend pretrial hearings because they often require only a brief appearance on the record where nothing substantive occurs. This point overlooks the role that such hearings play in efficiently administering and resolving cases. In Pierce County District Court, trial dates are not set at arraignment – at that point only a pretrial conference is set . In advance of the pretrial conference, the state emails plea offers to the defense on each case. The District Court relies on the parties to use pretrial conferences to negotiate, resolve, or determine which cases will be set for trial.

For example, guilty pleas, which require the defendants' presence, are commonly entered at a pretrial conference without advance warning to the court or the state. Change of pleas often occur at the first or second pretrial conference. If a defendant's presence were not required at a pretrial hearing, such early case resolutions would decrease precipitously. Negotiations would shift from pretrial hearings to the trial date. Dispositions would still occur, only later in the process, delaying justice for victims and clogging trial dockets with pleas or forcing continuances and further delays to accommodate resolutions.

The proposed rule would also frustrate many of the pretrial hearings that are currently scheduled in Pierce County Superior Court. Omnibus hearings are used to determine whether a case is ready to proceed to trial, and the parties will often request a trial continuance at these hearings. If defendants' presence were waived at the omnibus hearing, trial continuances would either occur on the day of trial, or at a separate continuance date that would have to be docketed. This requires the parties to either prepare unnecessarily for a trial that will not occur, which would disproportionately impact victims and witnesses who would be required to attend hearings that would not proceed, or add an additional date where the defendant will have to appear in court. The proposed rule change would result in additional hearings, additional unnecessary subpoenas and court filings, and uncertainty surrounding whether the defendant would receive notice to appear at a trial continuance motion.

Pretrial hearings in both District and Superior Court are also regularly used to address matters beyond case scheduling and for which a defendant must be present. For example, courts use pretrial conferences to address alleged pretrial release violations, hear motions to modify conditions of release, or conduct re-arraignments, among other things. Minimizing in-person appearances would also decrease the ability of the attorneys or the court to identify defendants whose competency may need to be evaluated. The proposed rule would shift the burden of scheduling and giving notice for such hearings onto the court and the state and would necessarily lead to delays in addressing these important issues. Having the defendant present at pretrial hearings may be critical in post-trial appellate litigation, as it can reduce the necessity of reference hearings needed to supplement the pretrial and trial record.

Off-the record-contact at pretrial hearings offer a *guaranteed* opportunity for defense counsel to communicate with their clients about their cases. Such communication includes discussion of plea offers, formulating counteroffers, identifying and requesting supplemental discovery, and working through factual and legal issues. Obtaining real-time input from defendants about these issues allows the parties to make informed and efficient decisions about how a case should proceed, whether to resolution via a guilty plea, or to motions and trial. It is a common refrain among defense attorneys, particularly public defenders, that they will not know how their clients wish to proceed until speaking to them at a pretrial hearing. This is because it is often difficult, if not impossible, for defense attorneys to have consistent and meaningful conversations with their clients prior to an in-court meeting. Pretrial hearings are often the *only* time defense attorneys can contact their

clients. The proposed rule would exacerbate these problems and make it more difficult to effectively schedule and resolve cases.

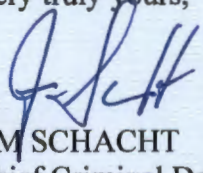
The proponents of this rule suggest that the change would avoid the unnecessary issuance of bench warrants. Proponents also argue that when defendants fail to appear at pretrial hearings, prosecutors often threaten bail jumping charges in order to coerce defendants to plead guilty to their original charges. Whatever the validity of this concern, it has been essentially nullified with the passage of ESHB 2231 in the 2020 legislative session, which only allows bail jumping charges to be filed, with limited exceptions, when a defendant fails to appear for trial. In other words, in most felony cases, failing to appear at pre-trial hearings will never provide a basis to file bail jumping charges.

Finally, the proposal implicates defendants' sixth amendment right to be present at all critical stages of the proceedings but does not provide an adequate waiver procedure. The language of the proposed rule states that counsel will present a waiver that the defendant has signed indicating the defendant wishes to appear through counsel. This does not require that the waiver be submitted in court and on the record, nor that the waiver be knowing, voluntary, and intelligent, as no waiver language is contained in the proposed changes to CrR 3.4 and CrRLJ 3.4. The proposed rule appears to allow defense counsel to continue trials on behalf of the defendant, without the defendant being present. In practice, this will allow for innumerable appellate challenges, as without a requirement that the waiver be on the record, defendants will inevitably claim that their waiver was not knowing, voluntary, and intelligent, and no record will exist to substantiate or contradict their claim.

The proponents of this rule identify potential impacts that criminal defendants face when having to appear at numerous pre-trial proceedings. The proposed rule, however, is not the right way to mitigate these impacts, and would lead to greater difficulties in the administration of criminal justice. The goal of the criminal justice system should be to make the process more transparent. The proposed rule changes do the opposite.

We urge the committee to reject the proposed changes to CrR 3.4 and CrRLJ 3.4.

Very truly yours,



JIM SCHACHT
Chief Criminal Deputy
Pierce County Prosecuting Attorney's Office

From:	OFFICE RECEPTIONIST, CLERK
To:	Linford, Tera
Cc:	Tracy, Mary
Subject:	FW: Proposed Changes to CrR 3.4 and CrRLJ 3.4
Date:	Thursday, September 10, 2020 10:33:52 AM
Attachments:	2020 9-10 Supreme Court Rules Committee RE Proposed Changes to CrR 3.4 and CrRLJ 3.4 - Jim Schacht.pdf

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From: Cindy Woodland [mailto:cindy.woodland@piercecountywa.gov]
Sent: Thursday, September 10, 2020 10:25 AM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Subject: Proposed Changes to CrR 3.4 and CrRLJ 3.4

Attached please find submitted comment letter regarding proposed changes to CrR 3.4 and CrRLJ 3.4 from Pierce County Prosecutor's Office Chief Criminal Deputy Jim Schacht.

Thank you,

Cindy Woodland
Pierce County Prosecutor's Office
cindy.woodland@piercecountywa.gov