

**From:** [OFFICE RECEPTIONIST, CLERK](#)  
**To:** [Tracy, Mary](#)  
**Subject:** FW: CrR 3.4 Proposed Rule Change Comments  
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**From:** Smith, Tali [mailto:Tali.Smith@kingcounty.gov]  
**Sent:** Wednesday, April 29, 2020 11:52 AM  
**To:** OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>  
**Subject:** CrR 3.4 Proposed Rule Change Comments

Good Morning,

I have concerns about proposed changes to CrR 3.4 and CrRLJ 3.4. Below are concerns/comments I have:

**(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.

- 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
- Defense attorneys often use court appearances as a means to ensure their ability to communicate with their client. This will eliminate those opportunities.
- 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.
- This will 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.
- It will be difficult for the State to know if an out-of-custody defendant is actually still around.
- 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.

**(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 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).
- The relationship between sections (a) and (d) is unclear. 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?
- 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 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

Sincerely,



**Tali Smith** (she/her)

Deputy Prosecuting Attorney

Drug Court Unit

FTU Felony Filing Unit

Animal Cruelty Felony Filer

King County Prosecuting Attorney's Office

C521 King County Courthouse

516 3rd Avenue | Seattle | WA | 98104

☎ (206) 477-4386 | cell ☎ (206) 379-7976

✉ (206) ✉ [tali.smith@kingcounty.gov](mailto:tali.smith@kingcounty.gov)

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