WACDL Washington Association of Criminal Defense Lawyers

Larry Jefferson
President

Amy Hirotaka
Executive Director

April 30, 2021

Justices of the Washington Supreme Court
P.O. Box 40929
Olympia, Washington 98504-0929
VIA E-MAIL: supreme@courts.wa.gov

RE: Proposed Changes to CrR 3.2 and CrRLJ 3.2

Dear Justices:

The Washington Association of Criminal Defense Lawyers (WACDL) writes to share support and some concerns to proposed changes to CrR 3.2 and CrRLJ 3.2.

WACDL is strongly in favor of *mandatory* release of people charged with non-violent crimes. WACDL has concerns about provisions restricting that mandatory release. Finally, WACDL has concerns about the changes to how bail is administered.

First, we support the mandate in proposed CrR/LJ 3.2(a) that courts release people charged with non-violent crimes on their personal recognizance. We urge you to only restrict such release under CrR/LJ 3.2(a)(1), which creates an exception to that mandate only if a person has failed to appear, after notice, on the current charge.

This change is important for many reasons. We have learned that some Washington courts do not follow current CrR/LJ 3.2, which requires them to *presume release* absent a showing that the accused is likely to fail to appear, commit a violent crime, or interfere with the administration of justice.

Unfortunately, many courts default to the setting of bail. Altering CrR/LJ 3.2 to mandate release in some cases would allow more people to consider plea offers without pressure to plead guilty to get out of jail and allow counsel time to thoroughly prepare for trial. It would also give those who may ultimately plead guilty the chance to ameliorate problems that led to their charges, leading to sentences that take their remediations into account. For example, a person charged with third degree driving while license suspended[1] might be able to pay off traffic tickets and get relicensed, or a person charged with a crime related to substance abuse could start treatment.

WACDL has learned from our membership many stories of clients who were held on bail pretrial on non-violent offenses. A couple of those examples are below:

- "My client was a mentally ill veteran. After years of navigating bureaucracy, he finally obtained housing. He was beginning to heal and thrive. But he was

1511 Third Avenue
Suite 503
Seattle, WA 98101
(206) 623-1302
Fax (206) 623-4257
info@wacdl.org
wacdl.org

[1] RCW 46.20.342(1)(c)

charged with A4/DV, from an incident that predated the housing, and he was held on $5,000 bail. The alleged victim repeatedly contacted the prosecutor, the court, and me to tell us that she had no intention of coming to court, that she had moved to another state, that she would never be seeing the client again, that if he was gone from the housing for more than 30 days, they would kick him out and he would be homeless again, and that she desperately wanted him out of jail. You know what happened. The prosecutor and court ignored her. He was held in jail for 60 days until trial, A/V FTAd, the case was dismissed, and he was released from jail into homelessness."

- "My client was held on a misdemeanor charge on $1,000 bail. He was on the cusp of homelessness and could not pay. I worked hard to rush the case to trial as quickly as possible knowing he would lose his housing if he was in custody for longer than 30 days. Courtroom congestion and backed up trials caused us to have our trial date continued despite our objection. My client never waived speedy trial. Over two months later, after my client lost his housing and all of his belongings, the City dismissed the case on the day before trial. All of that loss was for nothing. He was a victim to prosecutor's power and gamesmanship. And there was nothing we could do to stop it."

Please adopt proposed CrR/LJ 3.2(a) and mandate release for non-violent offenses unless a person has previously failed to appear on the current charge.

Second, we also ask that you alter proposed CrR/LJ 3.2(a) to allow courts to set bail upon defense request so that a person who will be in custody anyway can earn credit for time served on the current offense. As it reads now, proposed CrR/LJ 3.2 (a) may deprive an accused person of the chance to earn credit for time served on the current charge even if they will be in custody anyway. If the accused is held on a second charge for which a court has set bail they are unable to pay, they may wish to be held on both charges so that they can get credit for time served on the current charge. *See* CrRLJ 7.2(a) and CrR 7.2(a) (sentencing court must grant credit for time served); *Reanier v. Smith*, 83 Wn.2d 342 (1974). We ask that you allow a court to set nominal bail even on a non-violent offense that meets the criteria in proposed CrR/LJ 3.2(a), but *only* upon defense requests.

Third, the remaining sections of proposed 3.2(a)(1) and (2) should not be adopted. The language is unclear and may result in confusion, as well as inconsistent application across the state. Proposed CrR/LJ 3.2(a)(1) and (a)(2) would allow courts to continue to detain people charged with non-violent crimes if they are on probation or community custody or on pretrial release for a separate crime. We ask that you not adopt these sections for three reasons. First, the current offense might not violate conditions of probation or community custody for a previous offense or might not violate conditions of release for a pending charge. If it does, the court of conviction or of the pending charge can take action after hearing from counsel familiar with the relevant case. Second, a disparate number of people of color are trapped in the criminal legal system, whether on pretrial release or post-conviction supervision. Allowing a court to hold a person because of a condition that may be linked to their race would exacerbate the racism and implicit bias already present in the criminal legal system. Third, the factors in proposed CrR/LJ 3.2(a)(2) and (3) are not necessarily relevant to a likely failure to appear or a likely danger the accused will commit a violent crime or interfere with the administration of justice.

If this Court adopts proposed CrR/LJ (a)(2), we ask that you limit it to when "the accused is on probation or community custody ***in this court***."

If the Court adopts CrR/LJ 3.2 (a)(3), we ask that you specify that it applies only to people who are *currently* released on a separate offense. As it reads now, that proposed section could be interpreted to allow pretrial detention of any person ever released pretrial on nearly any charge. We suggest it read "the accused has been released on personal recognizance or bail for a ***pending*** offense alleged to pre-date the current charge."

Our final concern is about proposed changes to current 3.2(b) to alter how courts set bail. While we recognize the unfairness of a system that requires many people to permanently lose money to bail bonding companies, we are concerned the proposed change eliminating current 3.2(b)(4) would leave courts without enough guidance about the return of bail money. Bail funds, such as the Northwest Community Bail Fund[2] and The Bail Project,[3] rely on the return of bail money to continue posting bail for people otherwise unable to afford release. We ask that you not eliminate current CrR/LJ 3.2(b).

We agree with ACLU's comment regarding this provision. Specifically:

> *"As we work to reduce the harmful and consequential impacts of pretrial detention, it is important to ensure that CrRLJ 3.2 and CrR 3.2 provide judges with the maximum number of options to construct the least restrictive conditions and form of bail necessary for an individual defendant's future appearance in court. The cash appearance bond option in CrRLJ(b)(4) allows the court discretion to order an amount not to exceed 10% of the bond value without use of a commercial surety or the requirement of collateral. This option should be available and more routinely imposed for poor and low-income individuals who are unable to secure a bond with property or a commercial surety. The option of having the money returned at the end of the case also avoids significant financial hardship for indigent individuals and their families and is consistent with the purpose of bail. The proposed amendment to deleted 3.2(b)(4) is a step in the wrong direction, and the edits to 3.2(b)(5) are unnecessary and may create confusion."*

Please adopt proposed CrR/LJ 3.2(a)(1) and keep current CrR/LJ 3.2(b)(4). Thank you for your consideration.

Sincerely,

/s/Larry Jefferson
WACDL President

/s/ Emily M. Gause
WACDL Court Rules Committee Co-Chair

[2] https://www.nwcombailfund.org/
[3] https://bailproject.org/spokane/

From: OFFICE RECEPTIONIST, CLERK
To: Linford, Tera
Subject: FW: Attached: comments on CrR 3.2 and CrRLJ 3.2
Date: Friday, April 30, 2021 4:35:48 PM
Attachments: Comments on CrR 3.2 (2021).pdf

From: Fred Rice [mailto:fred.rice@wacdl.org]
Sent: Friday, April 30, 2021 4:31 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Subject: Attached: comments on CrR 3.2 and CrRLJ 3.2

To Whom It May Concern:

I am submitting the attached comments on behalf of the Washington Association of Criminal Defense Lawyers.

I would appreciate it if you would confirm receipt.

Very kind regards,

Fred Rice
Program Coordinator
WA Assn of Criminal Defense Lawyers
1511 3rd Ave Ste 503
Seattle, WA 98101
P 206-623-1302
F 206-623-4257
www.wacdl.org