

 **King County**
Department of
PUBLIC DEFENSE

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April 30, 2021

Court Rules Committee
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 Court Rules Committee:

The King County Department of Public Defense supports the proposed changes to CrR 3.2 and CrRLJ 3.2 (collectively “3.2”) which center these rules on the individual’s right to freedom from pretrial detention. We believe the changes are an important step towards minimizing pretrial detention of those presumed innocent, and support the adoption of the proposed rules.

Proposed CrR 3.2 cabins the detention of individuals charged with non-violent offenses. Given the deep racial disparities in bail amounts and pretrial detention, revised CrR 3.2’s mandate that these individuals be released (except under the delineated circumstances in which the CrR 3.2(b) and (c) factors must be considered) is critically important. Black defendants face higher bail amounts than white defendants charged with the same crimes.¹ Generally, the likelihood of otherwise “similarly-situated” Black and Latinx² defendants being incarcerated pretrial because they are unable to pay the ordered bail amount was twice that of white defendants.³ Data from just last month shows that 39.9% of incarcerated adults in King County are Black.⁴ That same data shows that 1,285 individuals, 94.6% of the individuals currently

¹ E.g., Shawn Bushway & Jonah Gelbach, National Science Foundation, *Testing for Racial Discrimination in Bail Setting Using Nonparametric Estimation of a Parametric Model* (2011), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1990324.

² The term “Latinx” is used a gender-neutral alternative to Latino/Latina that, unlike “Hispanic,” does not exclusively honor Spanish origin. When “Hispanic” is used referenced materials, it is replaced with the more inclusive “Latinx.”

³ Cynthia E. Jones, *“Give Us Free”: Addressing Racial Disparities in Bail Determinations*, 16 N.Y.U.J. Legis. & Pub. Pol’y 919 (2013); *Bail Reform and Risk Assessment: The Cautionary Tale of Federal Sentencing*, 131 Harv. L. Rev. 1125, 1129 (2018) (citing Stephen Demuth & Darrell Steffensmeier, *The Impact of Gender and Race-Ethnicity in the Pretrial Release Process*, 51 SOC. PROBS. 222, 222 (2004)).

⁴ <https://kingcounty.gov/~media/courts/detention/2021-03-Highlights.ashx?la=en>

incarcerated in King County jail, are detained pre-sentencing.⁵ We believe that reducing the exercise of discretion in the release of non-violent individuals will reduce racial disparity in pre-trial detention.

Notwithstanding our support for the rule, we believe it could improved in the following ways:

- We believe it is important that the rule expressly permits the setting of bail at the *defendant's* request. Individuals with multiple holds often will not get credit for each unless there is a separate and independent bail set on each cause number. We want to ensure the rule cannot be interpreted to preclude the imposition of bail at the request of defense.
- We believe that 3.2(a)(2) and (3) should be removed. Because 3.2(a) is expressly limited to non-violent offenses, the only consideration before the Court in setting conditions should be the likelihood of nonappearance. Proposed 3.2(a)(2) and (3) simply do not speak to that consideration, and thus should not trigger the imposition of bail. Further, given the overrepresentation of people of color in all areas of the criminal legal system, requiring that a judge consider one's status on supervision will necessarily import racially discriminatory data into the bail analysis.

Thank you for reviewing this important rule, the application of which often unfortunately shapes outcomes in the criminal legal system. The racial disproportionality of the pre-trial release decisions has far-reaching impacts due to the deleterious impact that pre-trial incarceration has on case outcomes.⁶ Recent studies demonstrate a causal link between pretrial incarceration and adverse case outcomes. Those held in jail during the pretrial period are 25% more likely to plead guilty, particularly when pleading guilty will allow freedom while maintaining one's innocence could require months, and in some cases years, of continued pretrial incarceration.⁷ Those individuals incarcerated for the entire pretrial period are "over four times more likely to be sentenced to jail and over three times more likely to be sentenced to prison than those who were released at some point pending trial. Proposed 3.2 takes an important step towards mitigating the harm of racial disparity in pretrial detention and we urge the Court to adopt with our proposed amendments, attached.

⁵ <https://kingcounty.gov/~media/courts/detention/2021-03-Highlights.ashx?la=en>

⁶ Arpit Gupta, Christopher Hansman, Ethan Frenchman, *The Heavy Costs of High Bail: Evidence from Judge Randomization*, 45 J. Legal Stud. 471, 472 (2016) ("We find that the assessment of money bail is a significant, independent cause of convictions and recidivism.").

⁷ *Bail Reform and Risk Assessment: The Cautionary Tale of Federal Sentencing*, 131 Harv. L. Rev. 1125, 1128 (2018); see also Paul Heaton, Sandra Mayson, & Megan Stevenson, *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 Stan. L. Rev. 711, 714 (2017); see also John D. Parron, *Pleading for Freedom: The Threat of Guilty Pleas Induced by the Revocation of Bail*, 20 UPAJCL 137; see also Samuel Wisemen, *Pretrial Detention and the Right to be Monitored*, 123 YLJ 1344 (2014).

Sincerely,

A handwritten signature in black ink, appearing to read 'Anita', followed by a long, horizontal, wavy flourish.

Anita Khandelwal
Director

CrR 3.2 RELEASE OF ACCUSED

If the court does not find, or a court has not previously found, probable cause, the accused shall be released without conditions.

(a) Presumption of Release in ~~Nonecapital~~ Cases.

The court shall release any person charged with a non-violent crime on the accused's personal recognizance, unless the person requests that bail be set or the accused has failed to appear, after notice, on the current charge.

~~— (2) the accused is on probation or community custody, or~~

~~— (3) the accused has been released on personal recognizance or bail for an offense alleged to pre-date the current charge.~~

Any person, other than a person ~~charged with a capital offense~~, charged with a violent crime or charged with a non-violent crime and meeting the criteria above, shall at the preliminary appearance or reappearance pursuant to rule 3.2.1 or CrRLJ 3.2.1 be ordered released on the accused's personal recognizance pending trial unless:

(1)(2) [Unchanged.]

(b) Showing of Likely Failure to Appear—Least Restrictive Conditions of Release. If the court determines that the accused is not likely to appear if released on personal recognizance, the court shall impose the least restrictive of the following conditions that will reasonably assure that the accused will be present for later hearings, or, if no single condition gives that assurance, any combination of the following conditions:

(1)(3) [Unchanged.]

~~(4) Require the execution of a bond in a specified amount and the deposit in the registry of the court in cash or other security as directed, of a sum not to exceed 10 percent of the amount of the bond, such deposit to be returned upon the performance of the conditions of release or forfeited for violation of any condition of release. If this requirement is imposed, the court must also authorize a surety bond under section (b)(5);~~

~~(5) Require the execution of a bond with sufficient solvent sureties, or the deposit of cash, which need not be the same amount as the bond and which shall not be greater than,~~ in lieu thereof;

~~(6) Require the accused to return to custody during specified hours or to be placed on electronic monitoring, if available; or~~

~~(7) Impose any condition other than detention deemed reasonably necessary to assure appearance as required. If the court determines that the accused must post a secured or unsecured bond, the court shall consider, on the available information, the accused's financial resources for the purposes of setting a bond that will reasonably assure the accused's appearance.~~

(c) – (o) [Unchanged.]

From: [OFFICE RECEPTIONIST, CLERK](#)
To: [Linford, Tera](#)
Subject: FW: Proposed Changes to CrR 3.2 and CrRLJ 3.2
Date: Friday, April 30, 2021 1:18:34 PM
Attachments: [proposed 3.2 response FINAL.pdf](#)

From: Khandelwal, Anita [mailto:Anita.Khandelwal@kingcounty.gov]
Sent: Friday, April 30, 2021 1:16 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Subject: Proposed Changes to CrR 3.2 and CrRLJ 3.2

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Dear Court Rules Committee:

Attached is a letter concerning proposed changes to CrR 3.2 and CrRLJ 3.2. Please do not hesitate to contact me with questions.

Thank you.

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