From: OFFICE RECEPTIONIST, CLERK
To: Linford, Tera
Subject: FW: Comments on proposed amendment to CrR/CrRLJ 3.2
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From: Martin, Margo [mailto:Margo.Martin@kingcounty.gov]
Sent: Friday, April 30, 2021 2:46 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Subject: Comments on proposed amendment to CrR/CrRLJ 3.2

Dear Clerk of the Supreme Court,

I have been a deputy prosecuting attorney with the King County Prosecuting Attorney's Office for the past 8 years. I am currently assigned to the office's Economic Crimes Unit, handling Identity Theft cases. Nearly all of the cases that I currently prosecute are classified as non-violent and most of the defendants are out-of-custody pending trial. I am writing to add my voice in strong opposition to the adoption of the proposed amendments to CrR 3.2 and CrRLJ 3.2.

Preliminarily, I want to make clear that I believe bail reform is a laudable goal, and I am in agreement with what appears to be the principle behind the proposed amendment—most defendants charged with non-violent offenses should be released on personal recognizance with other conditions imposed as necessary. That central principal is codified in our Constitution and is already the presumption under the existing rule. However, it is very important that this presumption can be overcome in certain circumstances. The problem with the proposed amendment is that it creates an effectively mandatory release provision that would override the discretion of the trial court if the charge is a "non-violent crime." This creates at a number of issues.

First, The new mandatory release provision which would be created by the proposed amendment applies if the charge is "non-violent," however there is no definition of what is a "non-violent" versus "violent" crime for these purposes. There are a significant number of crimes that do not involve clear or obvious acts of violence, but create a very real concern for the safety of the victim(s) and the broader community. Examples of these are Residential Burglary- where the risk for confrontation between the perpetrator and the victim is significant, Stalking- which involves repeated intimidation, harassment, or following, Violation of a Court Order- which demonstrates that court orders not to engage in certain behaviors will be inconsequential to the perpetrator, Rape in the Third Degree- where the victim is violated in one of the most personal ways possible, Unlawful Possession of a

Firearm- where a defendant has been informed by a prior Court that they are not permitted to have a firearm in their control, or Tampering with Witness- where the administration of justice is at danger from a perpetrator trying to prevent witnesses from testifying truthfully. While the amended rule would continue to recognize that "violent crimes" are not limited to the definition of a violent offense under RCW 9.94A.030, the combination of mandatory release for a class of crimes with the lack of definition of that class will—at best—lead to constant litigation as to whether a charge qualifies as "violent", and the trial court would preliminarily be required to make a discretionary finding as to whether they have discretion to impose conditions of release. At worst, a trial court could believe that it has no discretion to set conditions of release in such cases because the defendant is not charged with a "violent offense."

Second, the proposed amendment requires the court to unconditionally release defendants even in the face of overwhelming evidence that the defendant will not voluntarily reappear in court absent the imposition of bail and/or other conditions. The proposed amendment would preclude a trial court from considering such factors as the defendant's lack of ties to the community, current warrant history in other jurisdictions, history of failing to appear in non-pending cases, the likely length of sentence the defendant faces, the strength of the defendant's connection to the community, and even the defendant's stated intention. Take, for example, a hypothetical case in which a defendant is charged with a non-violent crime, but has no pending cases and is not on probation or supervision. He does, however, have no ties to Washington State and was arrested with a airline ticket to fly out of the state or even out of the country the following day, a conviction history for prior Tampering with Witnesses, Escape, and Elude, and a history of multiple warrants for failure to appear in prior non-pending cases in Washington and/or out of state. Under the proposed amendment, the trial court be required to unconditionally release that defendant on his personal recognizance. In my current case load, I have encountered defendants who have perpetrated identity thefts across multiple states and have had immediate plans to flee the jurisdiction if released without bond conditions and not return for court unless they were arrested on a new offense.

Third, the proposed amendment does not take into consideration defendants who may be held in custody on other charges when a "non-violent" case is filed. Such a defendant would not be entitled to credit for time served on all of their pending cases because the Court would not have discretion to impose a nominal bail on pending "non-violent" cases and have the defendant booked under that cause number while they are booked on the violent offense. As an example, a hypothetical defendant charged with Assault in the Second Degree-Domestic Violence and held in custody in lieu of posting bail. That defendant is also charged with Identity Theft in the First Degree. Both are level 4 offenses for the purposes of calculating the standard sentencing range under RCW 9.94A.505(2)(i) and RCW 9.94A.510. As such, if the defendant was held in custody for two months pending trial on the Assault in the Second Degree charge, and during that two months was also awaiting trial on the Identity Theft in the First Degree charge, that defendant would only be entitled to credit for the time served on the Assault charge, thereby extending the amount of time they would spend in custody because that period of time would not have been served under the Identity Theft cause number.

In sum, while most defendants charged with non-violent offenses are and should be released on their personal recognizance, that is not always the case. The proposed amendment removes

discretion from the trial courts to weigh the “non-violent” crime charged against the defendant’s prior convictions, chronic failure to appear, lack of ties to the community and incentive to flee, and the determination of whether the court has discretion or not turns on the undefined term “violent offense.”

For all of these reasons, I respectfully urge the court to reject the proposed amendment.

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