

KING COUNTY PROSECUTING ATTORNEY'S OFFICE



DANIEL T. SATTERBERG
PROSECUTING ATTORNEY

JUSTICE
COMPASSION
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September 30, 2021

Clerk of the Supreme Court
Temple of Justice
P.O. Box 40929
Olympia, WA 98504-0929

Re: Proposed Amendments to CrR 3.4

Dear Justices of the Supreme Court,

Thank you for seeking comments to the Superior Court Judges' Association's (SCJA) proposed amendments to the Superior Court Criminal Rule (CrR) 3.4. After carefully reviewing the proposed changes and the comments filed in support and opposition to them, I urge you to reject the changes because they are premised on fundamental misconceptions about the criminal justice system, will lead to the *unfair* administration of justice in a post-pandemic Washington State, and will unintentionally degrade a defendant's constitutional right to appear and defend in person.

The SCJA proposes amending CrR 3.4(e) and (f) because requiring fewer physical appearances for defendants "would likely lead to fewer missed court dates and warrants" and "should decrease daily court congestion and allow for a more expeditious case resolution while improving access to justice." Significantly, these justifications are couched in conditional terms and are unaccompanied by any evidentiary support. The data we have gathered in King County, however, strongly refutes the notion that fewer mandatory physical court appearances by people charged with felony crimes will make our system more efficient and fairer. Rather, we are now finding that cases take much longer to resolve, many more people fail to appear one or more times for court, and enormous efforts are wasted by attorneys, judges, witnesses, and staff preparing for hearings and trials for defendants who do not voluntarily submit themselves to the jurisdiction of the court.

In the study I discuss below, nearly half of all criminal defendants in Superior Court failed to appear in court, and only 20% of them returned voluntarily within four months, with 60% returned involuntarily through the execution of bench warrants. The remaining 20% never returned within the four-month period. These results occurred during a time when CrR 3.4 required more physical presence than it does now, or as proposed to be amended. As all justice system actors try valiantly to dig out of unprecedented case backlogs arising from the past 18

months of the pandemic, now is not the time to pass rules that will result in further waste, delay, and inefficiency in the court system.

Seattle University Economics Professor Claus Pörtner recently studied all failure to appear (FTA) warrants issued by King County Superior Court in felony prosecutions from 2014-19.¹ He calculated that about 45% of defendants failed to appear during that six-year period.² This calculation, however, understates the FTA rate because a significant portion of the defendants who appeared were in custody and therefore could not fail to appear. The fact that nearly half of all defendants failed to appear is striking given that at the time CrR 3.4 required them to physically appear, and not doing so risked a warrant for their arrest, jail time, and new charges.

Interestingly, looking at this same six-year group of defendants, Dr. Pörtner discovered that less than 20% of defendants who failed to appear returned voluntarily within four months. The majority of defendants, about 60%, returned involuntarily following arrest within four months. The remaining approximately 20% of defendants did not return within four months. Although it is possible that requiring fewer physical appearances may result in fewer FTAs in the short-term as defendants appear remotely or through counsel, or do not receive a FTA until later in the case, there will still be defendants who fail to appear and there is no reason to conclude that the percentages of defendants who return on their own accord versus upon arrest (or not at all) will change.

During the COVID-19 pandemic, our practice at arraignment has been to note a “COVID FTA” when defendants fail to appear for a case filed at summons. For post-arraignment hearings, we ask to continue the matter one week and request that the court find good cause for the defendant to appear. If the defendant does not appear at the next court date, then we request a warrant or a “COVID FTA” as appropriate. Consistent with Dr. Pörtner’s study, during the COVID-19 pandemic we have found that very few of these defendants who fail to appear return to court voluntarily, and that most of them appear only after arrest.

On February 1, 2021, the most recent amendments to CrR 3.4 took effect allowing defendants to appear remotely or through counsel for many pretrial hearings. Although these changes were similarly motivated by the desire to reduce missed court dates and “make the court process more effective and efficient,”³ that has not been the result in King County. Courts typically have not required defendants to physically appear until omnibus (about two weeks before the trial date) or later. Since the amendments took effect, over 1300 defendants have failed to appear in King County Superior Court, 836 of them after arraignment. This has resulted in continuances on the eve of trial and an eventual warrant, after both parties and the court have prepared for a trial that cannot occur, squandering increasingly precious time and money, witness interviews, issuance of subpoenas, and forensic testing.

¹ A copy of Dr. Pörtner’s Memorandum is attached to the CrR 3.4 Comment submitted by David Baker, Data Analytics Manager and Senior Deputy Prosecuting Attorney for King County.

² The number of individuals with at least one FTA, 11,541, divided by the number of different individuals charged during those years, 25,851, is 44.64%.

³ Washington Defender Association’s GR 9 Cover Sheet available at: https://www.courts.wa.gov/court_rules/?fa=court_rules.proposedRuleDisplay&ruleId=4753 (last visited Sept. 19, 2021).

Throughout this period, the length of time that it takes for a case to reach disposition has skyrocketed. Since the onset of the COVID-19 pandemic, the median age of felony cases to disposition has more than doubled to 289 days, and is nearing one year for Class A felonies.⁴ The continued upward trend is alarming when considered in context. While the pandemic and resulting backlog initially drove the upsurge, the rise in times to disposition continues unabated, despite the reopening of the courts, significantly increased negotiation efforts⁵, and hundreds of State v. Blake dismissals.⁶

Equally concerning, the monthly average number of pleas in King County has not returned to the pre-COVID level even with these efforts.⁷ Deputies report extending better plea offers to defense counsel, not receiving responses, proceeding to omnibus, and finding that the defendant fails to appear, and a warrant is eventually issued. Taken together, Dr. Pörtner's findings and this more recent data confirms that further discouraging defendants' physical presence by adopting the proposed changes will achieve the exact opposite of what the proponents seek, and will instead exacerbate court congestion and delays in case resolution.

Moreover, and perhaps more importantly, the proposed changes will serve to exacerbate the inequity in the criminal justice system. The proposed rules would benefit only a select group of English-speaking defendants who have the means to appear remotely and do not need an interpreter. Poor defendants without adequate devices and reliable internet access will be unable to appear by video. Victims, witnesses, and others seeking justice will not be afforded the same privilege of appearing remotely. Adopting these changes will thwart the fair administration of justice by leading to further inequity and delay.

Further, the proposed changes will not "improv[e] access to justice" as claimed. A defendant has a constitutional right to appear and defend in person. Wash. Const. art. I, § 22. Appearing remotely diminishes that right by degrading the defendant's ability to observe, understand, and participate in court proceedings. Reviewing documents and exhibits over video does not provide defendants with the same access as being present in court to review them. Remote defendants cannot simultaneously consult with counsel during the proceedings, making them disinclined to interrupt court and seek a complete break in the proceedings to have a confidential conversation with defense counsel. The potential chilling effect is likely worse for non-English speaking defendants who require an interpreter and might already be reluctant to ask questions or consult with counsel.

Requiring physical presence for defendants also ensures that defendants will be required to prioritize engagement with their lawyers and the courts. It also provides an opportunity for the court to assess the defendant's competency, it fosters clearer communication between defense counsel and their clients, and it creates opportunities for the defendant to engage directly with the court, if needed.

⁴ Charts displaying the rise in times to disposition are attached to the CrR 3.4 Comment submitted by David Baker.

⁵ Our office has added negotiation deputies, offered more favorable reductions, dismissed cases, and declined filing charges.

⁶ 197 Wn.2d 170, 481 P.3d 521 (2021).

⁷ A chart displaying the monthly average number of pleas in King County is attached to the CrR 3.4 Comment submitted by David Baker.

Remote appearances by video or telephonic conferencing, do not expedite proceedings but delay them. The court has to assure that the defendant is able to hear and observe what is happening in the courtroom, and stop the proceedings to resolve the inevitable technological failures that occur. Arraigning defendants by video has actually reduced courtroom capacity. In the past, our office scheduled 50 defendants for in-person arraignment. Now, we schedule 30 defendants for video arraignment because it takes longer to ensure that defendants understand the charges against them and the conditions of release.

For all of these reasons, I respectfully urge you to reject the proposed amendments.

Sincerely,

A handwritten signature in cursive script that reads "Daniel T. Satterberg". The signature is written in black ink and is centered on the page.

DANIEL T. SATTERBERG
King County Prosecuting Attorney

From: [OFFICE RECEPTIONIST, CLERK](#)
To: [Linford, Tera](#)
Subject: FW: Comment re: CrR 3.4 Proposed Changes
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Attachments: [DTS Comment re CrR 3.4.pdf](#)
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From: Relyea, Kristin [mailto:Kristin.Relyea@kingcounty.gov]
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To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
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Dear Clerk,

Attached please find a comment regarding the proposed changes to CrR 3.4 by Daniel T. Satterberg, King County Prosecutor. Please confirm receipt.

Thank you,
Kristin

Kristin A. Relyea
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Senior Deputy Prosecuting Attorney
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****I work MONDAYS, WEDNESDAYS, & THURSDAYS (and often at night and on the weekends!)****