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Subject: FW: Proposed changes to CrRLJ 3.4
Date: Monday, February 28, 2022 4:06:52 PM

From: John Ziegler [mailto:zieggie@hotmail.com]
Sent: Monday, February 28, 2022 4:01 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Subject: Proposed changes to CrRLJ 3.4

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From: John G. Ziegler, WSBA #5875
Sent: Monday, February 28, 2022 @ 15:50
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Subject: Proposed changes to CrRLJ 3.4

Honorable Justices of the Washington State Supreme Court,

I am writing to you to express my opposition to the changes to CrRLJ 3.4, Presence of the Defendant, proposed by the District and Municipal Court Judges Association (DMCJA). I have been practicing criminal law in Washington since my admission to practice in 1974, in both trial and appellate arenas. For years, I have been an active member of both the Washington Defender Association (WDA) and the Washington Association of Criminal Defense Lawyers (WACDL).

Prior Hardship: Before the 2021 changes to CrRLJ 3.4, trial courts in Washington had adopted local court rules and practices requiring the defendant to be present at nearly every pretrial hearing, causing hardship to defendant, especially the poor. Over and over, defendants were forced to be absent from work or school, try to arrange, and pay for, childcare and transportation. Any failure to appear (FTA) was met by disaster from four directions:

> (a) courts issued "no bail" arrest warrants (and no arrest happens at a convenient time);
>
> (b) when the person appeared in court after an arrest or quashing of warrant, their "speedy" trial time clock was reset to zero, CrRLJ 3.3(c)(2)(ii);

(c) prosecutors could file "bail jumping" charges, used to either coerce harsher acceptance of more punitive guilty plea offers or as added charges from which prosecutors could argue that the FTA showed "consciousness of guilt" by "fleeing;" [1]

(d) if a judge believed that the failure to appear was an expression of disrespect to the court, the defendant's bail would be raised, causing hardship to poor families. Revocation of pretrial release, either directly or by the simple ruse of setting unaffordable bail, would cause loss of school or employment position, eviction from rental housing, and serious damage to family relationships. Pretrial incarceration leads to increased chance of conviction or forced acceptance of a far less advantageous plea offer. These hardships fell disproportionately on low income, homeless and mentally ill defendants and, as is true of nearly every aspect of the criminal process, heavily on minority defendants.

State v. Gelinas, 15 Wn.App.2d 484 (2020), established the test for determining whether the defendant's presence could be required at hearings other than arraignment, trial, and sentencing:

> . . . a hearing is not “necessary” unless the defendant's absence prevents the case from proceeding . . . the State did not show and the district court did not find that his failure to appear in person, rather than through counsel, prevented the court from setting the case for trial as Gelinas's counsel requested.

The DMCJA Cover Sheet urging amendment to CrRLJ 3.4 contains the assertion that "*Gelinas* ... has **caused considerable confusion** surrounding when courts of limited jurisdiction may require a defendant’s physical appearance . . . and when these courts have the authority to issue a bench warrant for nonappearance." But there is **nothing** "confusing" about *Gelinas.* While the current (2021) version of CrRLJ 3.4 recognizes that some hearings may require a defendant's physical (or remote) presence for "good cause," that term is not further defined. *Gelinas* clarified "good cause" with a clear, simple, certain, and functional test that carries out this Court's intention to keep "required" attendance to a minimum: if an FTA causes a disruption in the current scheduling of the case, the defendant's physical presence is "necessary."

Constitutional Implications: The very first constitutional trial right granted to criminal defendants by Washington Constitution Article I section 22 is that "the accused shall have the right to appear and defend in person, **or by counsel**." There are no discovered decisions on whether this provision provides greater protection

than the U.S. Constitution of the right to appear **solely** by counsel,[2] but it may be observed that (a) the first two of six *Gunwall* factors (State text and differences between federal and State provisions), has proved crucial when this Court has found greater State protection, (b) there is normally a paucity of guidance on the third and fourth factors (State and common law history) while (c) the fifth and sixth factors (structural differences between federal and State provisions, particular State interest,) inherently favor independent construction of the State constitution.[3]

No Support from Superior Courts: The Superior Court Judges Association (SCJA) has expressed no need to change the present CrR 3.4. The SCJA accepted the 2021 amendment and even proposed "robust" additions to broaden video conferencing under CrR 3.4(e)-(f). *See* Supreme Court Order No. 25700-A-1355, proposed changes to CrR 3.4 (April 2021).

Ethical Minefield: More than two dozen practicing criminal defense attorneys have submitted comments unanimously opposing the proposed changes to CrRLJ 3.4, nearly 2/3 of which have pointed out that the proposal would require them to violate RPC 1.6. Each attorney's ethical position will dictate refusal to obey the proposed rule, a recipe for chaos in the courts of limited jurisdiction.

Conclusion: Please reject this hopelessly flawed proposed rule change.

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[1] The excessively punitive nature of the bail jumping statute was substantially reduced by the legislature by Laws 2020 ch. 19 sec. 1.

[2] This provision has been held to furnish greater State protection of the right to proceed *pro se* than the federal constitution, both at trial, *State v. Silva*, 107 Wn.App. 605 (2001), and on appeal, *State v. Rafay,* 167 Wn.2d 644 (2009).

[3] *Richmond v. Thompson*, 130 Wn.2d 368 (1996); *Silva, supra*, 107 Wn.App at ___..

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