



February 24, 2022

Justices of the Washington Supreme Court
P.O. Box 40929
Olympia, Washington 98504-0929

RE: Proposed Changes to CrRLJ 3.3 and CrRLJ 3.4

Dear Justices:

The Washington Defender Association (WDA) opposes the District and Municipal Court Judges' Association (DMCJA) proposals to amend CrRLJ 3.3 and CrRLJ 3.4.

Before current CrRLJ 3.4 went into effect on February 1, 2021, there was a presumption that people charged with crimes had to physically appear in court for all hearings. Before the Court of Appeals decision in *State v. Gelinis*, 15 Wn.App.2d 484, 478 P.3d 638 (2020), courts issued bench warrants for people charged with misdemeanors who were not present at hearings, even if their presence would have done nothing to advance their cases.

The combination of current CrRLJ 3.4 and *Gelinis* allows people accused of misdemeanors to appear through counsel at routine hearings without fear of bench warrants. They can continue to subsist, work,¹ attend school or provide childcare² while still addressing the accusations against them. Many people can now fully litigate their cases rather than pleading guilty to avoid onerous court appearances³ or to get out of jail.

¹Washington law does not require employers to provide time off for court dates, leaving many people unable to afford to leave work and attend court. Due to income disparities, women and Black, Indigenous and People of Color disproportionately face the difficult choice between going to court or earning the money they need to survive. WASHINGTON STATE SUPREME COURT GENDER AND JUSTICE COMMISSION, 2021 GENDER JUSTICE STUDY (2021), at page 49.

<https://www.courts.wa.gov/?fa=home.sub&org=gjc&page=studyReport&layout=2&parent=study>.

²Onsite childcare centers can help parents and guardians attend court. WASHINGTON STATE SUPREME COURT GENDER AND JUSTICE COMMISSION, 2021 GENDER JUSTICE STUDY (2021), *supra*, at pages 41-42. Unfortunately, few Washington courts offer onsite childcare centers.

³ One of several challenges to physically attending court is lack of transportation. For example, there are five "transportation deserts" in Washington, all in rural areas. "Transportation deserts" both lack public transportation and have lower than average rates of car ownership. WASHINGTON STATE SUPREME COURT GENDER AND JUSTICE COMMISSION, 2021 GENDER JUSTICE STUDY (2021), *supra*, at page 48.

The DMCJA proposal would reverse the benefits of current CrRLJ 3.4 and *Gelinas*. DMCJA's proposed change to CrRLJ 3.4(c) would create a presumption that the accused must physically appear at all hearings. Proposed CrRLJ 3.4(d) would allow a judge to issue a bench warrant anytime a person accused of a misdemeanor misses a hearing the court has required them to attend.

Current CrRLJ 3.4 and *Gelinas* are working well. Public defenders consult with their clients who appear through counsel before and after hearings. If a defender tries unsuccessfully to contact a client, the defender declines to give the court information when asked how the case should proceed. The court then sets a second hearing, finds good cause for the client to appear in person or remotely and sends the client a summons. Only if the client misses the second hearing does the court issue a warrant, giving clients and lawyers a grace period to reconnect. As attached declarations from defenders who have appeared in Chelan County District Court, Whatcom County District Court and King County District Court-Bellevue Division attest, courts can both follow current CrRLJ 3.4 and *Gelinas* and run smoothly. The Adult Criminal Committee of the BJA Court Recovery Task Force (CRTF) has proposed two new rules, CrRLJ 4.11 and CrRLJ 4.12, that would codify existing procedures. We urge the Court to adopt those rules instead of the DMCJA proposal.

While the coversheet for DMCJA's proposed changes to CrRLJ 3.4 discusses the benefits of remote hearings, the proposed rule would make an accused's physical presence the default. Even if judges in courts of limited jurisdiction were to allow people accused of misdemeanors to attend court remotely, some would not be able to do so. Many jobs do not allow workers to be available at specific times. People who work in manual labor, construction, healthcare, childcare, the service industry and agriculture may have little or no control over when they can take breaks.⁴ Others lack the technology to appear remotely.⁵

⁴ The Washington Department of Labor and Industries requires that workers get 30-minute meal periods "no less than two hours nor more than five hours from the beginning of the shift" and that 10-minute rest periods "be scheduled as near as possible to the midpoint of the work period." WAC 296-126-092(1), (4). However, employers are not required to schedule breaks in advance of workers' shifts, making it difficult for many people to plan for remote court. For example, workers at Amazon warehouses take breaks whenever their supervisor instructs them to. Querysprout. <https://querysprout.com/amazon-break-policy/#:~:text=If%20an%20Amazon%20warehouse%20worker,use%20bathroom%20breaks%20as%20needed.>

⁵In 2014 in King County, households that made less than \$50,000 a year were 5.5 times less likely to have home internet access than those who made above \$50,000 a year. A 2012 Census Bureau survey showed that nationally many households lacked internet access at home. Access to the internet varied by race: "23% of white households did not have any internet access in the home while 38% of Black households and almost 36% of Hispanic households lacked all access

We understand the DMCJA is concerned about the backlog of cases due to Covid and the possibility that current CrRLJ 3.4 and *Gelinas* will create difficulties even absent Covid related delays. However, the benefits of limiting court appearances and bench warrants outweigh the harms of requiring courts of limited jurisdiction to adjust. The criminal legal system sometimes tends toward judicial efficiency more than equity and humanity. This Court has recognized that and taken steps toward more just laws in Washington. We see current CrRLJ 3.4 as one of those steps and urge you to stand by it.

Please reject the DMCJA proposals to amend CrRLJ 3.3 and CrRLJ 3.4 and adopt the CRTF proposed new rules CrRLJ 4.11 and CrRLJ 4.12.

Sincerely,

A handwritten signature in black ink, appearing to read "Magda Baker", with a long horizontal flourish extending to the right.

Magda Baker, Misdemeanor Resource Attorney

to the internet.” WASHINGTON STATE SUPREME COURT GENDER AND JUSTICE COMMISSION, 2021 GENDER JUSTICE STUDY (2021), *supra*, at page 45.

Attachments:

Declarations of public defenders Eric Mapes, Thomas
Fryer and Jennifer Slempp

I, Eric R. Mapes, WSBA no 45509, am over the age of 18. I make the following declaration, which is true and correct to the best of my knowledge.

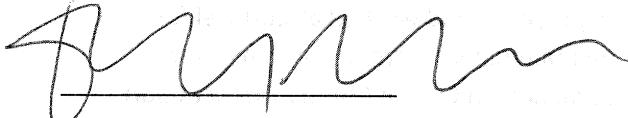
1. I was the District Court Supervisor for Counsel for Defense of Chelan County from 2019 through the end of 2021. I have practiced law for the past eight years, and worked at Counsel for Defense of Chelan County for about five years. I maintain regular contact with my former colleagues there, and am familiar with the current practices in Chelan County District Court.
2. I supervised three attorneys who appeared in Chelan County District Court. Two had full caseloads, and one attorney had a partial caseload.
3. Chelan County District Court has two elected judges.
4. Chelan County District Court schedules three kinds of routine court dates: arraignment dates, dates for omnibus hearings and trial dates. At arraignment, the court sets a pretrial conference hearing date. Chelan County District Court also schedules motion hearings, hearings to review allegations that an accused person has violated conditions of release or suspended sentence, and probation violation hearings.
5. At a pretrial hearing the parties either request trial dates or request a continuance. One case may require several pretrial conference hearings.
6. Prior to the Court of Appeals' decision in *State v. Gelinis*, 15 Wn.App.2d 484 (2020), and the effective date of CrRLJ 3.4, if an accused person was not physically present at a pretrial conference hearing, the court would usually issue a bench warrant.
7. Currently, Chelan County District Court allows accused people to appear through their attorneys at pretrial conference hearings, probation violation hearings, and other hearings where the presence of the accused is not necessary under the court rules. If an attorney represents to the court that a client has given the attorney permission to request a continuance, the court will continue the case to another hearing.
8. If a client is not present, and the attorney does not have information for the court about how the client wants to proceed, the court will generally make a finding that the client's presence in some form is necessary at the next scheduled hearing. The court then sends the client written notice of the subsequent hearing, including notice that he or she must appear. Consistently with the ethical duty to communicate regarding the representation, counsel is also expected to contact the client and explain that his or her presence is required at the next hearing.
9. When the judges set hearing dates, they indicate on a form whether the accused's appearance at that hearing will be necessary. If it is not a hearing where the presence of the accused is necessary under the court rules, the judges state on the record the reasons why the presence of the accused is required at the subsequent hearing. If the accused fails to appear at a hearing at which his or her presence is necessary under the court rules, or at a hearing for which the court

has otherwise found the accused's presence necessary, the court will usually issue a bench warrant.

10. Chelan County District Court is functioning smoothly using the procedures I have described.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Signed this 26th day of January, 2022, in Bellingham, Washington

A handwritten signature in black ink, appearing to read 'Eric Mapes', written over a horizontal line.

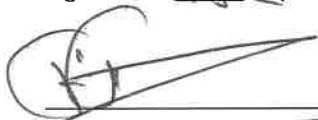
Eric Mapes, WSBA no. 45509

I, Thomas Fryer, am over the age of 18. I make the following declaration, which is true and correct to the best of my knowledge.

1. I am the District Court Supervisor for the Whatcom County Public Defender's Office. I have practiced law for over 28 years, and I have worked at the Whatcom County Public Defender's Office for over two years. I have been the District Court Supervisor for over two years.
2. I supervise five attorneys who appear in Whatcom County District Court. Each attorney has a full caseload.
3. Whatcom County District Court has two elected judges and one appointed commissioner.
4. Whatcom County District Court requires persons charged with misdemeanors to physically attend arraignments, trials, hearings at which they plead guilty and sentencings. The Court will typically also require an in-person appearance at hearings regarding alleged pre-trial violations and at hearings regarding alleged violations of the terms of probation. On occasion the Court will allow virtual appearances at arraignment and at hearings during which a guilty plea is entered. The court allows most people charged with misdemeanors to appear through counsel at omnibus hearings.
5. Omnibus hearings in Whatcom County District Court are pretrial hearings during which the parties can request a continuance, set a case for trial or ask the court to accept a guilty plea. A case may be continued multiple times over the course of several omnibus hearings.
6. When a client is not physically or remotely present at an omnibus hearing and the client's lawyer cannot affirm that they have had recent contact with the client the court will find good cause to require the client's physical presence at a subsequent hearing on the date trial is currently set. If the client does not appear at the subsequent hearing, the court usually issues a bench warrant. In rare circumstances, the court will schedule one more hearing two weeks out, giving the client another chance to physically appear before issuing a bench warrant.
7. Whatcom County District Court is functioning smoothly using the procedures I have described.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Signed this 19 day of February 2022 in Bethlehem Washington


Thomas Fryer, WSBA#22955

I, Jennifer Slemph, am over the age of 18. I make the following declaration, which is true and correct to the best of my knowledge.

1. I am a public defender working in King County District Court, Bellevue - East Division, I work at Stein, Lotzkar & Starr, P.S. I have practiced law for the past nine years, and I have been in my current position since January 2, 2020.
2. King County District Court, Bellevue - East Division has two elected judges.
3. King County District Court, Bellevue - East Division sets a date for a pre-trial conference at arraignment. The court does not set a trial date at arraignment.
4. At a pre-trial conference, the defendant usually does one of three things—requests a continuance, resolves their case by pleading guilty to an agreed upon charge pursuant to a plea bargain with the prosecutor, or sets their case for trial. If setting for trial, at least one more hearing will be scheduled for jury call. The court does not set a trial date unless and until the defendant confirms for trial at the jury call.
5. Many cases have multiple pre-trial conferences because many cases get continued several times.
6. If the case can move forward without the defendant being present physically or virtually at pre-trial hearing, the court does not usually require the defendant to be present, although the court does sometimes require that an individual defendant be present at pre-trial conference.
7. Before the court requires the defendant to be present at an upcoming pre-trial conference, it conducts a careful inquiry and considers multiple factors, including the nature of the charge and if the defendant's presence is necessary to move the case forward.
8. If the court has previously required a defendant's presence at a pre-trial hearing and the defendant is not present at that hearing, the court conducts a careful inquiry before deciding whether to issue a bench warrant or note the failure to appear and reset the case. Factors the court considers include the importance of reducing the spread of COVID-19 and safety of the community.
9. Even when the defendant's presence at a pre-trial hearing has been deemed necessary at a prior hearing, counsel may present a signed "Order On Case Setting And Waiver Of Time For Trial," and the court will usually continue the case rather than issue a bench warrant.
10. Defense counsel may set a case for trial regardless of whether their client is present. The court then schedules a jury call date at which the client's presence is mandatory. If the client is not present at jury call, the court will issue a bench warrant.

11. If a defendant appears through counsel at a hearing, the court summonses the defendant for the next hearing by sending notice through the United States Postal Service.
12. King County District Court, Bellevue - East Division continues to function smoothly using the procedures I have described.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Signed this 4th day of February 2022 at Seattle, Washington

A handwritten signature in black ink, appearing to read 'Jennifer Slem', is written over a horizontal line.

Jennifer Slem, WSBA # 45629

From: [OFFICE RECEPTIONIST, CLERK](#)
To: [Linford, Tera](#)
Subject: FW: comment on proposed CrRLJ 3.3 and 3.4
Date: Friday, February 25, 2022 11:06:58 AM
Attachments: [02.24.22 WDA comment opposing changes to CrRLJ 3.3 and 3.4.pdf](#)

From: Magda Baker [mailto:Magda@defensenet.org]
Sent: Friday, February 25, 2022 10:31 AM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Subject: comment on proposed CrRLJ 3.3 and 3.4

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Hello,

Attached is Washington Defender Association's comment opposing DMCJA's proposed changes to CrRLJ 3.3 and CrRLJ 3.4. Because the comment exceeds 1500 words with attachments, I mailed it via the U.S. Postal Service yesterday. I am sending it as a PDF here in case it is helpful for you to have it in electronic form.

Thank you for your time.

Magda Baker
She/her
Washington Defender Association
Cell: 206-226-9512
magda@defensenet.org