LEESA MANION (she/her)
PROSECUTING ATTORNEY

King County

Office of the Prosecuting Attorney
CRIMINAL DIVISION - Appellate Unit
W554 King County Courthouse
516 Third Avenue
Seattle, Washington 98104
(206) 477--9497

April 28, 2023

Ms. Erin L. Lennon, Clerk
Washington State Supreme Court
P.O. Box 40929
Olympia, WA 98504-0929
Email: supreme@courts.wa.gov

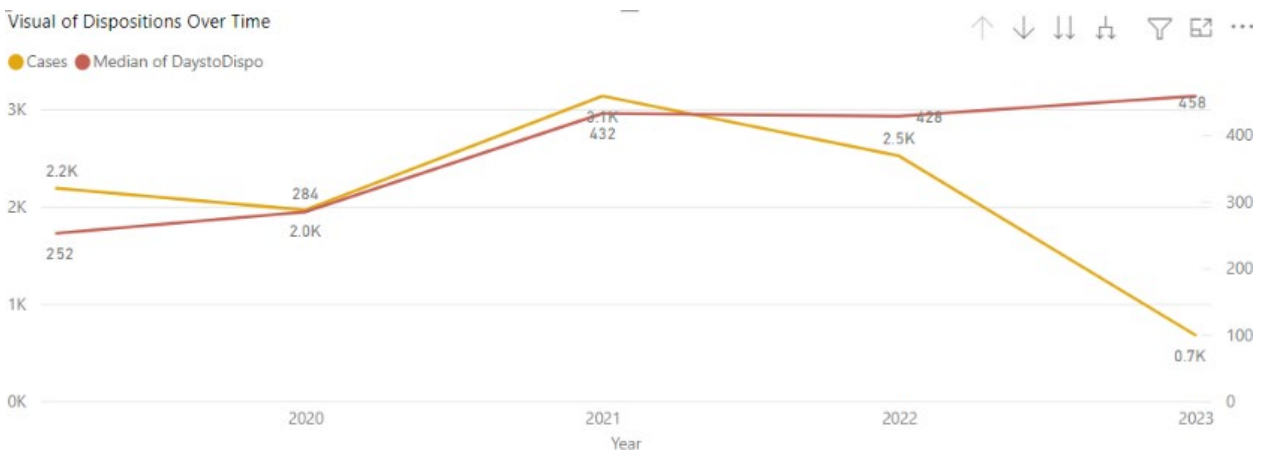
RE: Proposed CrR 4.11 and CrLJ 4.11

The Washington State Constitution demands that justice be administered without unnecessary delay. Wash. Const. art. I, § 10. Justice delayed is justice denied for both society and for criminal defendants. Litigants have a both a right and a responsibility to participate in their cases.

The pandemic-era changes to CrR 3.4 were well-intended. The reduced attendance model freed defendants from unnecessary and burdensome attendance and sometimes led to greater efficiency for lawyers and courts. However, an occasional or almost-never attendance model takes that good idea to a counterproductive extreme. Current practice has bogged down the trial courts and saddled them with a standard that hamstrings the trial courts' need to expeditiously move cases through the system. Proposed CrR 4.11 will only exacerbate current delays in resolving cases.

During the pandemic, King County Superior Court saw a slowing rate of case resolutions and an increase in the age of cases. The out of custody median days to disposition increased by 176 days from 252 in 2019 to 428 in 2022, and continues into 2023. (Figure 1).

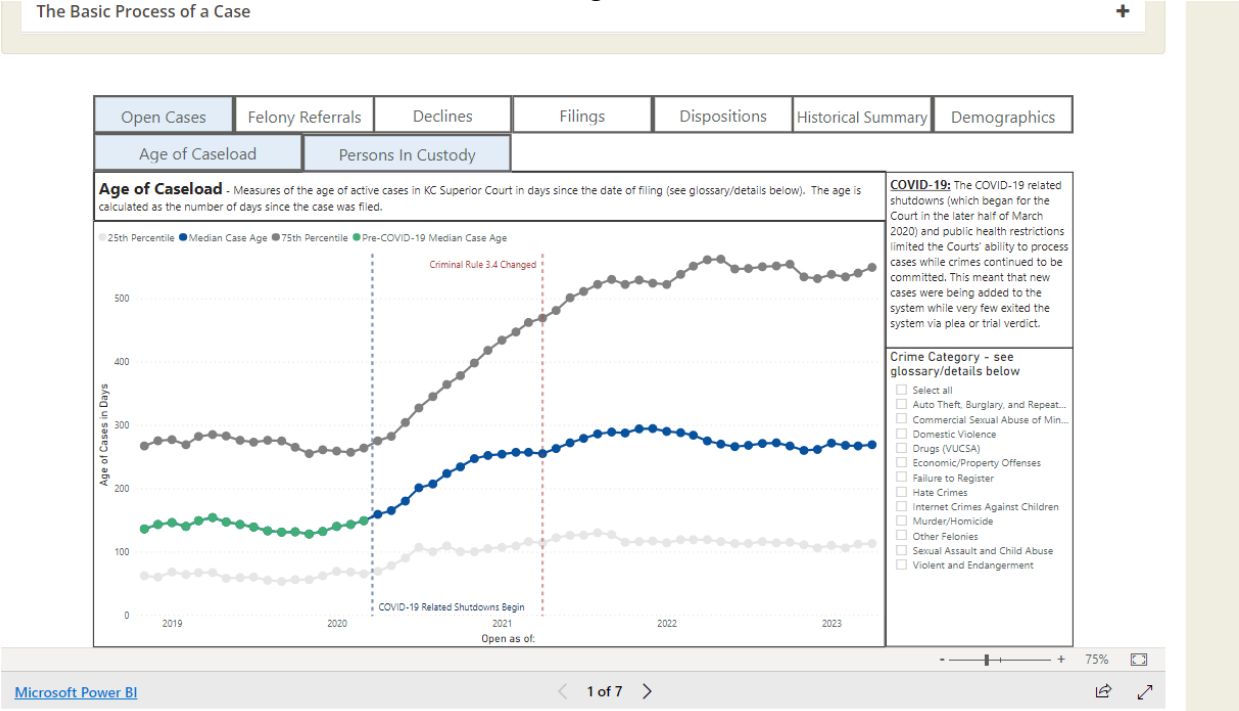
Figure 1



From the KCPAO public dashboard: https://kingcounty.gov/depts/prosecutor/criminal-overview/CourtData.aspx

Our data also showed an increase in the age of open cases.

Figure 2



However, as courts adapted to public health restrictions and as the pandemic eased in 2021, the rate of resolutions and the age of cases should have shown returns toward normal rates, but that has not occurred. Rates of resolution remain slow and the age of cases has barely lowered. The failure to move toward normal rates of resolution and age of cases is in part due to the impact of CrR 3.4.

These pandemic-era trends are unsustainable. Slow resolution of cases and stale cases endanger the health of the superior court. The proposed CrR 4.11 will exacerbate these unsustainable trends because cases simply cannot be efficiently moved through the system when multiple hearings are required for what used to require only a single hearing. This inefficiency is tied to the relationship between defendants, defense counsel, and the courts.

Under CrR 3.4, defense counsel is the critical communication link between the court and defendants. Reliance on that link is untenable, however, where defense counsel can appear in court without a client and then assert they cannot ethically tell the court whether, when, how, or to what extent they told their client they had to appear at the scheduled hearing or trial. Without open communication between defense counsel and the court, the entire "appearance through counsel" model in CrR 3.4 collapses and the additional delays recommended in the amendments to CrR 4.11 worsen the situation.

The fact that neither defense counsel nor the defendant is responsible to appear at hearings gives the defense an inordinate degree of control over how quickly cases move through the system. The rules should not assign to counsel a duty to communicate information if the lawyer cannot fulfill that duty.

This undue influence over time-to-resolution fosters unhealthy incentives. A criminal defendant who is out of custody has very little incentive to quickly resolve his or her case: victims and witnesses tire of the delay and lose resolve; memories fade; witnesses move, become ill, or die. Punishment delayed is, to a defendant, better than punishment administered quickly, especially if punishment can be reduced or avoided.

The occasional or almost-never attendance model also fosters broader unhealthy incentives to tolerate or even increase backlogs. Defense funding levels are determined by caseloads. The greater the backlog of cases with missing or recalcitrant defendants, the more semi-active cases that draw funding but do not require active attention from counsel. There is no incentive for defense counsel to dispose of these cases.

Moreover, congested criminal dockets increase pressure on prosecutors to resolve cases in a manner that does not reflect the true magnitude of defendant's crimes. Defense counsel have incentives to slow the time to resolution in the hopes of shopping at fire sales.

Finally, it should be noted that the law is unsettled in Washington regarding the sometimes-conflicting duties of a criminal defense lawyer to their client versus the lawyer's duty of candor to the court. When does the lawyer, as an officer of the court, have a duty to truthfully inform the court as to whether the lawyer told the client that a hearing or trial had been set? Common sense suggests the lawyer owes such a duty of candor to the court, at least in some circumstances. It is not obvious why the mere fact of informing the client of a hearing date is privileged. The defense lawyer's relative ethical duties to the court and client should be decided by this Court in a proper rule-making process focused on the legal merits of that precise issue. It should not be indirectly and haphazardly decided by default in this proposed rule on a different matter.

For these reasons, I respectfully ask this Court to reject the proposed rules CrR 4.11 and CrLJ 4.11. The rules will only compound the serious time-to-resolution issues currently facing our trial courts.

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Attached please find my comments to proposed rules CrR 4.11 and CrLJ 4.11.

Thank you,

Jim Whisman
Senior Deputy Prosecuting Attorney
Appellate Unit Chair
King County