

March 17, 2020

Chief Justice Debra L. Stephens
Washington State Supreme Court
P.O. Box 40929
Olympia, WA 98504-0929

[Via email to supreme@courts.wa.gov](mailto:supreme@courts.wa.gov)

Dear Chief Justice Stephens:

Hours ago, this Court issued Emergency Order No. 25700-____, *In the Matter of Temporarily Closing the Temple of Justice Building to the Public*. We write, on behalf of the WACDL/WDA COVID-19 Response Taskforce, to ask this Court to issue the attached proposed order for all criminal matters in Washington State to effectuate a similar closure of our criminal courts in response to the COVID-19 public health emergency. As we write this letter, members of the public continue to congregate in groups well over 50 persons in our courtrooms. Keeping our criminal courts open directly contravenes Proclamation 20-14 issued by Governor Jay Inslee on March 16, 2020, as well as recommendations from the Center for Disease Control and Prevention, to limit gatherings to groups of no more than 50 persons. Many, if not most, of our criminal courtrooms are too cramped to allow for any social distancing. Consequently, our criminal courts are directly contributing to the spread of COVID-19 and seriously jeopardizing the safety and health of criminal defendants, all attorneys, all court staff, all jail staff, all judges, and all members of the public they interact with, inside and outside of the courtroom. Choosing between safeguarding one's health and coming to court are untenable choices for all actors in our criminal justice system. We respectfully ask the Court to issue our attached proposed Order, summarized below in this letter to protect our clients, ourselves and other attorneys, court staff, jail staff, judges, and members of the public.

Our taskforce is comprised of representatives from the following criminal defense and allied organizations:

- Washington Association of Criminal Defense Lawyers (WACDL)
- Washington Defender Association (WDA)
- Washington Foundation for Criminal Justice
- Public Defender Association
- King County Department of Public Defense
- Snohomish County Public Defender Association
- Snohomish County Office of the Public Defender
- Thurston County Public Defense
- American Civil Liberties Union of Washington
- Columbia Legal Services
- Disability Rights Washington¹

¹ Our membership includes attorneys who practice throughout Washington State, including King, Snohomish, Skagit, Thurston, Walla Walla, Whatcom, and Yakima Counties, and members of the private and public defense bar.

On March 4, 2020, the Washington State Supreme Court issued Order #25700-B-602, *In the Matter of the Response by Washington State Courts to the Public Health Emergency in Washington State*, authorizing local jurisdictions to “adopt, modify, and suspend court rules and orders, and to take further actions concerning court operations, as warranted to address the current public health emergency.” Consequently, several courts have issued conflicting orders relating to their courtroom closure. Here is a summary of the various responses. Some, but not all, courts are:

- Continuing all jury trials;
- Proceeding with trials, but excluding high-risk populations from the juror pool;
- Continuing routine calendar matters through agreed orders and waiving appearance;
- Continuing, but requiring telephonic appearances or in-person appearances for routine calendar matters even if the matter is agreed;
- Issuing warrants for non-appearance by defendants for routine calendar matters;
- *Not* issuing warrants for non-appearance by defendants for any matters.

It should be noted that these procedures not only vary from court to court, but from courts within the same county. Superior, district, and municipal court orders in the same county may look quite different.

Governor Jay Inslee has issued the following Orders and Proclamations that place limitations on public contact:

- Proclamation 20-08, March 12, 2020: Closure of all Washington schools, public and private, through April 24, 2020
- Proclamation 20-12, March 13, 2020: Closure of all Washington public and private universities through April 24, 2020
- Proclamation 20-13, March 16, 2020: Closure of Restaurants, Bars, Coffee shops, Faith-based Organizations, among other public venues, through March 31, 2020
- Proclamation 20-14, March 16, 2020: Limiting the size of gatherings to 50 people or less through March 31, 2020

Requiring court appearances during this crisis, in our view, directly contradicts Proclamation 20-14, and conflicts with the spirit of the other proclamations. Keeping the courthouses open also conflicts with recommendations issued by the Centers for Disease Control and Prevention to limit social gatherings to 50 people or less for the next eight weeks.² Criminal calendars in many counties can easily range from 100 to 200 defendants, not including court staff, jail staff, and attorneys. Lastly, with the public school closures, all actors in the criminal system face additional, significant, burdens in coming to court. It is clear that the public, courts, and attorneys need a streamlined, simplified order in place to supersede the orders of the local courts, so as to effectuate Governor Inslee’s proclamations and follow the CDC recommendations, as well as provide clear directives to the public about their access to our courts.

We propose that the closure remain in effect through the same date through which Governor Inslee has ordered closure of the public schools, namely, April 24th, 2020. Should this closure be extended, the Court can modify its order accordingly. We select this date because first, it relieves the burden of all of

² See <https://www.cdc.gov/coronavirus/2019-ncov/community/large-events/mass-gatherings-ready-for-covid-19.html>, accessed on March 16, 2020, at 5:48 PM.

those with children who cannot attend court hearings for child care reasons (including attorneys, court, and jail staff), and second, because this is a date that has been heavily publicized already and consistency will make it easier for the public to keep track of these dates. We ask for routine review of these restrictions and delays to consider whether circumstances allow this timeframe to be shortened, and whether the least restrictive means are in place, given the significant constitutional rights at stake.

Finally, multiple media organizations have reported on the potential for a COVID-19 outbreak in correctional facilities. Jails are facing their own staffing shortages right now in light of the public health emergency. Additionally, many criminal defendants fall within publicly identified highly vulnerable populations. We believe it is imperative to create a streamlined process for courts to reconsider release decisions and prioritize the sentencing of defendants who face imminent release from county jails based on anticipated sentencing decisions.

With that in mind, we attach a proposed Order for the Court to consider, summarized as follows:

1. All criminal jury trials, in custody or out of custody, shall be continued to after April 24, 2020;
2. All **out of custody** criminal hearings shall be continued to after April 24, 2020;
3. All **in custody** criminal matters shall be continued to after April 24, 2020, with the following exceptions:
 - a. Scheduling of first appearances, arraignments, plea and sentencing matters
 - b. Courts retain discretion in the scheduling of these matters, except that the following matters shall take priority:
 - i. Pretrial release motions
 - ii. Plea hearings and sentencing hearings that result in the anticipated release of the defendant within 30 days of the hearing
 - iii. Parties are not required to file motions to shorten time in scheduling any of these matters
4. Continuance of these matters is required in the administration of justice under CrR 3.3
5. No bench warrants shall issue for missed court appearances during this time
6. Defense counsel is not required to obtain signatures from defendants on orders to continue criminal matters through April 24, 2020
7. Motions for Pre-Trial Release:
 - a. Courts shall agree to hear motions for pretrial release on an expedited basis without requiring a motion to shorten time
 - b. The Court finds that the COVID-19 crisis constitutes a “material change in circumstances” under CrR/CrRLJ 3.2(k)(1) and “new information” allowing amendment of previous bail order or providing different conditions of release under CrR 3.2(k)(1)
 - i. Continuing trial dates until late April and into May will extend the pretrial detention period a minimum of 6 to 7 weeks for all defendants. In many cases, this will place significant pressure on defendants to plead guilty to get out of jail. In some cases, if defendants aren’t released from custody to await their new trial dates, they may serve more time in custody than allowed by the standard range or statutory maximum punishment
 - ii. CrR/CrRLJ 3.2 allows bail to be imposed only “if no less restrictive condition or combination of conditions would reasonably assure the safety of the community.” The extraordinary circumstances of this pandemic outbreak warrant the review of pretrial detention and the amount of bail imposed. Many people

- currently in custody may meet the criteria of “high risk” and be vulnerable to infection
- iii. This guidance from the Court will aid trial judges as they struggle to manage court dockets and protect the rights of defendants in custody
 - c. Parties may present agreed orders for release of in-custody defendants, which shall be signed expeditiously
 - d. If a hearing is required, courts shall schedule these hearings within five business days upon receiving Defendant’s motion to modify release conditions

We appreciate the Court’s consideration of our proposed Order. We understand the unique challenges criminal cases pose in that there are constitutional considerations in continuing these matters *en masse*. We believe that our proposal strikes the appropriate balance between honoring the constitutional rights of criminal defendants and guaranteeing the public health and safety of all actors in the criminal system—and by extension, the public at large.

We thank the Court for consideration of our proposed Order and letter. We fully appreciate the difficult challenges this Court—and all Washington State Courts—face in balancing the constitutional rights of criminal defendants against the need to protect public health, and we fully appreciate how hard these decisions are in the context of the uncharted waters we all find ourselves in.

Respectfully,



Amy I. Muth, WSBA #31862
Chair, WACDL/WDA COVID-19 Taskforce
Past President, WACDL

Signed on behalf of:

WACDL and WDA Members

- Ann Benson (Director, WDA Immigration Project)
- Hillary Behrman (Director of Legal Services, WDA)
- Elissa Brine (Member, WACDL and WDA)
- Robert Butler (President, WACDL)
- Patricia Fulton (Past President, WACDL)
- Emily Gause (Board Member, WACDL)
- Christie Hedman (Executive Director, WDA)
- Amy Hirotaka (Executive Director, WACDL)
- Larry Jefferson (President-Elect, WACDL)
- Gregory Scott (Past Vice President-East, WACDL)

WASHINGTON FOUNDATION FOR CRIMINAL JUSTICE

- Briteney Mercer (President)

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Rachael Seevers (Program Attorney)

cc:

Kathryn Leathers, General Counsel, Governor's Office
Sonja Hallum, Senior Policy Adviser, Public Safety, Governor's office
Russell Brown, Executive Director, Washington Association of Prosecuting Attorneys
John Hillman, Chief, Criminal Division, Washington State Office of the Attorney General
The Honorable Kitty-Ann Van Doorninck, Pierce County Superior Court, President, Superior Court Judges' Association
The Honorable Samuel Meyer, Thurston County District Court, President, District and Municipal Court Judges' Association
Lisa Shanahan, President, Washington State Jail Association
Jennifer Wallace, Executive Director, Washington Association of County Officials
Paula Swisher, CMC, Washington Municipal Clerks Association