FILED
SUPREME COURT
STATE OF WASHINGTON
FEBRUARY 19, 2021
BY SUSAN L. CARLSON
CLERK

THE SUPREME COURT OF WASHINGTON

IN THE MATTER OF STATEWIDE RESPONSE BY WASHINGTON STATE COURTS TO THE COVID-19 PUBLIC HEALTH EMERGENCY	)	FIFTH REVISED AND EXTENDED ORDER REGARDING COURT OPERATIONS No. 25700-B-658

WHEREAS, on February 29, 2020, Governor Inslee proclaimed a state of emergency due to the novel coronavirus disease (COVID-19) outbreak in Washington; and on March 13, 2020, President Trump declared a national emergency due to the COVID-19 outbreak across the United States; and

WHEREAS, during this state of emergency, the Centers for Disease Control and Prevention and the Washington State Department of Health have recommended increasingly stringent social distancing measures of at least six feet between people, and encouraged vulnerable individuals to avoid public spaces; and

WHEREAS, consistent with these recommendations, Governor Inslee issued and extended a "Stay Home, Stay Healthy" order directing non-essential businesses to close, banning public gatherings, and requiring Washingtonians to stay home except to pursue essential activities; and

WHEREAS, many court facilities in Washington are ill-equipped to effectively comply with social distancing and other public health requirements and therefore continued in-person court

appearances jeopardize the health and safety of litigants, attorneys, judges, court staff, and members of the public. Yet, court operations are recognized as essential, and may often be conducted by alternative means, in alternative settings, and with extra measures taken for public safety; and

WHEREAS, pursuant to this Court's prior orders, many Washington courts have taken important steps to protect public health while ensuring continued access to justice and essential court services, including by strictly observing social distancing measures, holding proceedings remotely, suspending many in-building operations, and promulgating emergency rules as necessary; and

WHEREAS, the coordinated response from Washington courts to prevent the further spread of COVID-19 must be continued beyond the timeframes in this Court's prior orders while allowing courts to operate effectively and maintain effective and equitable access to justice; and

WHEREAS, this Court's consultation with trial courts, justice partners and coordinate branches of government confirms the need for further direction from this Court by issuing an order that revises and supersedes its prior orders; and

WHEREAS, the presiding judges across Washington need direction and authority to effectively administer their courts in response to this state of emergency, including authority to adopt, modify, and suspend court rules and orders as warranted to address the emergency conditions.

NOW, THEREFORE, pursuant to the Supreme Court's authority to administer justice and to ensure the safety of court personnel, litigants, and the public,

IT IS HEREBY ORDERED:

Court operations are essential, as recognized by the Governor's proclamations and by the Supreme Court. This Court recognizes the authority of all courts to conduct essential court operations, to include not only trials and other hearings, but also clerk's office operations, facilities planning, technology improvements, and the general administration of justice. In all court operations, courts should follow the most protective public health guidance applicable in their jurisdiction, and should continue using remote proceedings for public health and safety whenever appropriate.

With Respect to Civil Matters:

1. The previous order suspending all civil jury trials until at least July 6, 2020 is lifted. Trials already in session where a jury has been sworn and social distancing and other public health measures are strictly observed may proceed or, at the discretion of the trial court or agreement of the parties, be continued to a later date. Courts have authority to conduct all proceedings in civil matters, including civil jury trials and non-jury trials, by remote means or in person, with strict observance of social distancing and other public health measures.
2. [Reserved]
3. Courts shall continue to prioritize and hear all emergency civil matters that can be heard by telephone, video, or other remote means, or in person with strict observance of social distancing and other public health measures. Courts should also continue to hear non-emergency civil matters, understanding that emergency matters retain priority.

4. Courts shall continue to hear emergency civil protection order and restraining order matters. Courts must provide an accessible process for filing petitions for civil protection orders and motions for temporary restraining orders, which may include filing petitions in person or remotely. Courts are encouraged to provide alternative means for filing, including electronic filing options whenever possible, especially when the courthouse is closed to the public or public clerk's office hours are restricted due to the public health emergency.

   a. Consistent with the Governor's Proclamation 20-45 et seq. (as extended), requirements for *personal* service of the petition for a protection order or temporary protection order are suspended, except as to orders directing the surrender of weapons or removal of the respondent from a shared residence. Personal service remains preferred, and courts should require personal service by law enforcement when removal of children or change of custody of children is ordered, or in other circumstances where public or individual safety demands it. Where personal service is not required, service may be by law enforcement, including electronic service with acknowledgment of receipt, by process servers, by agreed service memorialized in writing, by publication or by mail. If parties have previously agreed to e-mail service or opted into e-service in the case or other currently open related case, service of temporary protection orders or reissuance/continuance orders by e-mail or e-service shall be sufficient. Before proceeding with a full hearing, the judicial officer must require proof of service five days prior to the hearing.

   b. Judicial officers have discretion to set hearing dates and extend temporary protection orders based on the circumstances to reasonably allow for sufficient

notice, remote appearance, and presentation of evidence, while avoiding unreasonable delay. Statutory timeframes should be followed. Circumstances relevant to the setting of hearing dates include agreement of the parties, reasonable estimates for completing service, lack of prejudice, and specific findings of good cause, which may include restrictions in place due to the public health emergency. Reissuance orders may be similarly extended. Courts may provide a means for weapons surrender hearings that does not require in-person appearance only when consistent with public safety.

c. Guidance for courts implementing emergency measures under this section may be found here.

5. With respect to all civil matters, courts should encourage parties to stipulate in writing to reasonable modifications of existing case schedules and remote methods of service and to conduct discovery, pretrial hearings, and alternative dispute resolution by remote means whenever possible.

a. *Presumption of Remote Depositions:* With respect to discovery, depositions shall be performed remotely absent agreement of the parties or a finding of good cause by the Court to require the depositions be performed in person. Absent agreement of the parties, the only person permitted in the same room as the deponent is the deponent's lawyer, in which case the deponent and the deponent's lawyer shall each have their own video device with camera, and individual or shared audio feeds via microphone or telephone. If the deposition is being video recorded (see CR 30(b)(8)), the recording shall only be of the witness and not of other participants to the deposition proceeding.

b. *Presumption of Remote Service:* With respect to filing and service, other than initial service of process to establish personal jurisdiction, remote methods (i.e., electronic service) shall be used absent agreement of the parties or a finding of good cause by the court to require in-person methods. Where a party seeks to compel a third-party witness to a deposition, hearing, trial or other proceeding, in-person service is required of both the initial subpoena and any motion to compel, unless remote service is agreed to in writing by the third-party witness.

6. Cases filed pursuant to RCW 71.09 (Sexually Violent Predators) are civil cases. However, the liberty interests at stake necessitate prioritizing these cases over general civil cases, in terms of both addressing discovery or other pre-trial motions and assigning the cases for trial. All pre-trial motions in such cases may be decided without oral argument, unless a court grants a party's request for oral argument or *sua sponte* sets oral argument. When oral argument is to occur, such hearings may be conducted by telephone, video, or other means that do not require in person attendance. If in person hearings are required, they shall be conducted with strict observance of social distancing and other public health measures.

With Respect to Criminal and Juvenile Offender Matters:

7. The previous order suspending all criminal jury trials until at least July 6, 2020 is lifted. Trials already in session where a jury has been sworn and social distancing and other public health measures are strictly observed may proceed or be continued if the defendant agrees to a continuance. Courts have authority to

conduct nonjury trials by remote means or in person, with strict observance of social distancing and other public health measures.

8. Courts should continue to hear **out of custody** criminal and juvenile offender matters by telephone, video or other means that do not require in person attendance when appropriate. In addition, courts may hear matters that require in person attendance if those hearings strictly comply with social distancing and other public health measures.

9. Courts may enter ex parte no contact orders pursuant to RCW 10.99.040, RCW 10.99.045, RCW 7.92.160, RCW 7.90.150, RCW 9A.46.085, and/or RCW 9A.46.040, when an information, citation, or complaint is filed with the court, either by summons or warrant, and the court finds that probable cause is present for a sex offense, domestic violence offense, stalking offense, or harassment offense. Ex parte orders may be served upon the defendant by mail or by electronic means of service. This provision does not relieve the prosecution of proving a knowing violation of such an ex parte order in any prosecution for violating the order. Good cause exists for courts to extend ex parte orders beyond the initial period until a hearing can be held.

10. Courts should continue to hear **in custody** criminal and juvenile offender matters by telephone, video or other means that do not require in person attendance when appropriate. In addition, courts may hear matters that require in person attendance provided that any such hearings strictly comply with social distancing and other public health measures. Courts retain discretion in the scheduling of hearings,

except that priority should be given to pretrial release and bail modification motions, as well as plea hearings and sentencing or disposition hearings that result in the anticipated release of the defendant or respondent from pretrial detention within 30 days. Parties are not required to file motions to shorten time in scheduling any of these matters.

11. Juvenile court jurisdiction in all pending offender proceedings, including those in which juvenile court jurisdiction has been extended pursuant to the court's emergency orders, shall be extended to the offender's next scheduled juvenile court hearing after January 1, 2021.

12. A continuance of these criminal and juvenile offender hearings and trials is required in the administration of justice. Based upon the Supreme Court's finding that the serious danger posed by COVID-19 is good cause to continue criminal and juvenile offender trials, and constitutes an unavoidable circumstance under CrR 3.3(e)(8), CrRLJ 3.3(e)(8), and JuCR 7.8(e)(7), the time between the Supreme Court's May 29, 2020 Order and the next scheduled court hearing after October 15, 2020 shall be EXCLUDED when calculating time for trial. CrR 3.3(e)(3), CrRLJ 3.3(e)(3), JuCR 7.8(e)(3). After October 15, 2020, courts may further exclude time under these rules based on individual findings of "unavoidable circumstances" due to COVID-19 or other circumstances.

13. The Court finds that obtaining signatures from defendants or respondents for orders continuing existing matters places significant burdens on attorneys, particularly public defenders and all attorneys who must enter correctional

facilities to obtain signatures in person. Therefore, this Order serves to authorize continuing those matters without need for further written orders. Additionally:

a. Defense counsel is not required to obtain signatures from defendants or respondents on orders to continue criminal or juvenile offender matters consistent with this order. An attorney's signature on an order to continue constitutes a representation that the client has been consulted and agrees to the continuance, and courts shall allow attorneys to waive their clients' presence unless their presence is deemed necessary by the court.

b. Courts shall provide notice of new hearing dates to defense counsel and unrepresented defendants.

c. Defense counsel shall provide notice to defendants and respondents of new court dates.

14. Courts may exercise discretion in deciding whether a bench warrant should issue for failure to appear for criminal or juvenile offender court hearings or pretrial supervision meetings, or violations of conditions of release. However, in exercising such discretion, courts shall consider the following before issuing a warrant: a) Is a warrant necessary for the immediate preservation of public or individual safety? b) Is there a record that the subject of the warrant has received actual notice of the previously scheduled court hearing or reporting requirement? c) Is there a viable alternative for securing appearance such as the re-issuance of a summons or another means of notifying the subject that an appearance is required and re-setting the hearing date? Judicial officers shall give serious consideration

to the risk of COVID-19 transmission whenever a person is arrested and placed in detention, including whether the subject of the warrant is in a high risk category for exposure to COVID-19. *Courts should continue the practice of not issuing or enforcing bench warrants for juvenile status offenses or violations*. Additionally:

a. The facts supporting the issuance of a warrant must be current and recited on the record in open court.

b. The provisions of CrR 2.2(g) and CrRLJ 2.2(g) remain suspended for the duration of the Governor's state of emergency in response to the COVID-19 pandemic.

15. Motions for Pre-Trial Release:

a. Courts shall hear motions for pretrial release in criminal and juvenile offender matters on an expedited basis without requiring a motion to shorten time. Nothing in this section is intended to affect any statutory or constitutional provision regarding the rights of victims or witnesses.

b. The Court finds that for those identified as part of a vulnerable or at-risk population by the Centers for Disease Control, COVID-19 is presumed to be a material change in circumstances, and the parties do not need to supply additional briefing on COVID-19 to the court. For all other cases, the COVID-19 crisis may constitute a "material change in circumstances" and "new information" allowing amendment of a previous bail order or providing different conditions of release under CrR 3.2(k)(1) or CrRLJ 3.2(k)(1), but a finding of changed circumstances in any given case is left to the sound

discretion of the trial court. Under such circumstances in the juvenile division of superior court, the court may conduct a new detention hearing pursuant to JuCR 7.4.

c. Parties may present agreed orders for release of in-custody defendants and respondents, which should be considered expeditiously.

d. If a hearing is required for a vulnerable or at-risk person as identified above, the court shall schedule such hearing within five days. The court is strongly encouraged to expedite hearings on other cases with due consideration of the rights of witnesses and victims to participate.

16. Courts should continue to allow telephonic or video appearances for all scheduled criminal and juvenile offender hearings whenever appropriate. All in-person appearances must be conducted with strict observance of social distancing and other public health measures. For all hearings that involve a critical stage of the proceedings, courts shall provide a means for defendants and respondents to have the opportunity for private and continual discussion with their attorney.

General Provisions for Court Operations:

17. Access to justice must be protected during emergency court operations. Where individuals are required to access the court through remote means, courts must provide no-cost options for doing so or provide a means for seeking a waiver of costs. This provision does not require suspending existing systems for remote filings or hearings that are based on a user-fee model. For purposes of any law

specifying the location of court proceedings, whenever remote proceedings are authorized, they are deemed to take place in the courthouse where the matter is pending or venue exists regardless of where the judge, parties, witnesses or others participating remotely are located.

18. Courts must provide clear notice to the public of restricted court hours and operations, as well as information on how individuals seeking emergency relief may access the courts. Courts are encouraged to provide such notice in the most commonly used languages in Washington, and to make every effort to timely provide translation or interpretation into other languages upon request. The Washington State Supreme Court Interpreter Commission may assist courts in this process.

19. The availability of interpreter services should not be restricted by emergency operations. Interpreting should be done by remote means whenever possible, consistent with protocols developed by the Washington State Supreme Court Interpreter Commission.

20. Washington courts are committed to protecting rights to public court proceedings. Any limitations placed on public access to court proceedings due to the public health emergency must be consistent with the legal analysis required under *State v. Bone Club*, 128 Wn.2d 254 (1995) and *The Seattle Times v. Ishikawa*, 97 Wn.2d 30 (1982). Courts should continue to record remote hearings and to make the recording or a transcript part of the record, and should develop protocols for allowing public observation of video or telephonic hearings. Guidance for courts

in protecting public court proceedings during emergency operations can be found here.

21. Notwithstanding any provision of GR 30 to the contrary, an electronic signature shall be deemed a reliable means for authentication of documents and shall have the same force and effect as an original signature to a paper copy of the document so signed. For purposes of this Order, "electronic signature" means a digital signature as described in Supreme Court Order No. 25700-B-596 (July 16, 2019) and RCW 9A.72.085(5) (repealed); an electronic image of the handwritten signature of an individual; or other electronic sound, symbol, or process, attached to or logically associated with an electronic record and executed or adopted by a person with the intent to sign the record, including but not limited to "/s/ [name of signatory]".

    a. To the extent not already authorized, whenever a judicial officer or clerk is required to sign an order, judgment, notification, or other document an electronic signature shall be sufficient. The presiding judge, in consultation with the county clerk where applicable, should direct by administrative order the provisions for use of alternative signature methods for judicial officers in that jurisdiction. Guidance in developing such orders may be found here.

    b. Courts are authorized and are hereby encouraged when practicable to waive by emergency rule or order provisions of GR 30(d) that require: (1) the issuance of a user ID and password to electronically file documents with the court or clerk; (2) that a party who has filed electronically or has provided the clerk with

their email address must give consent to accept electronic transmissions from the court.

c. The Court finds good cause to permit RCW 26.04.070's requirement that marriages occur "in the presence of" an officiant to include the solemnization of marriages by remote video technologies in accordance with public safety and social distancing requirements. An officiant solemnizing a wedding by remote proceedings shall take necessary steps to confirm the identity of the parties, ensure they possess a valid marriage license, and confirm requirements to promptly complete and file certificates as required by law.

22. This Court recognizes that there are procedural issues in juvenile, dependency, involuntary commitment, child support, and other matters that may not be encompassed in this Order. Nothing in this Order limits other interested parties in submitting similar orders tailored to the unique circumstances of those matters and any other matters not addressed by this Order. Nothing in this Order prevents courts from following specific emergency plans for such matters, including for Involuntary Treatment Act and dependency and termination matters. Where any provisions of this Order may be interpreted to conflict with any provision of another Supreme Court order addressing specific case matters, the provisions of the more specific order shall control. *(See* Order No. 25700-B-616; Order No. 2500-B-647.)

23. Nothing in this Order limits the authority of courts to adopt measures to protect health and safety that are more restrictive than this Order, as circumstances

warrant, including by extending as necessary the time frames in this Order. However, courts are encouraged to move toward conducting as much court business as can be done consistent with public health and safety. Any summons issued for jury trials must provide a process for excusing or delaying jury service by individuals who are at higher risk from COVID-19 exposure based on their age or existing health conditions, or those of a household member. Specific guidance for conducting jury trials can be found here and here. Courts should follow the most protective public health guidance applicable in their jurisdiction, based on current guidelines from the Centers for Disease Control, the Washington Department of Health or their local health department, recognizing that planning for and resuming jury trials is essential. The Department of Health Guidance for Washington Courts can be found here.

24. The Supreme Court may extend the time frames in this Order as required by continuing public health emergency, and if necessary, will do so by further order. This Order and other applicable emergency orders may be deemed part of the record in affected cases for purposes of appeal without the need to file the orders in each case, and all time frames previously extended may be deemed further extended by this order. This Fifth Revised and Extended Order supersedes the Supreme Court's March 18, 2020 Order (as corrected March 19, 2020), its March 20, 2020 amended Order, its Extended and Revised Orders of April 13, 2020, April 29, 2020, and May 28, 2020, its Amended Third Revised and Extended Order of May 29, 2020, its September 10, 2020 Order Extending Excluded Period in

Calculating Time for Trial and Adopting Related Emergency Measures, and its Fourth Revised and Extended Order of October 13, 2020.

DATED at Olympia, Washington this 19th day of February, 2021.

For the Court

CHIEF JUSTICE

DISSENT (From October 13, 2020 Order)

I write to express my disagreement with the second sentence of paragraph 14 of this order that allows warrants to be issued for individual safety. The issuance of warrants for juveniles for their own "individual safety," especially during this COVID-19 era, is an abhorrent practice that must be abandoned. Incarceration of youth for non-criminal behavior under the guise of protection runs counter to the actual evidence that youth achieve better outcomes in a therapeutic setting. Responding to youth in need of assistance or protection is best achieved when we treat the issue as a public health matter. We know that incarceration harms children and the fact that Black youth, Indigenous youth, and youth of color are the ones disproportionally incarcerated should give every judicial officer pause.

González, J.

Montoya-Lewis, J.

Whitener, J.