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STATE OF WASHINGTON  
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SUPREME COURT No. 103003-7  
COA No. 85918-8-I  
Cowlitz Co. Superior Court No. 18-1-01424-08

SUPREME COURT OF THE STATE OF  
WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

DUSTIN ALAN GRIFFIN,  
Petitioner.

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REPONSE TO PETITION FOR REVIEW

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## I. IDENTITY OF RESPONDENT

The Respondent is the State of Washington, represented by Eric H. Bentson, Deputy Prosecuting Attorney for Ryan P. Jurvakainen, Cowlitz County Prosecuting Attorney.

## II. COURT OF APPEALS DECISION

The Court of Appeals' decision that the trial court did not abuse its discretion in applying Supreme Court guidance for appearing remotely during the COVID-19 emergency and that any error was harmless does not raise a constitutional issue. The Respondent respectfully requests this Court deny review of *State of Washington v. Dustin Alan Griffin*, Court of Appeals No. 85918-8-I.

## III. ISSUES PRESENTED FOR REVIEW

- (1) Does the Court of Appeals' decision, holding Griffin's remote appearance during a public health emergency did not violate his right to be present, involve a significant question of constitutional law?

#### IV. STATEMENT OF THE CASE

Griffin was convicted of Aggravated Murder in the First Degree and several other felonies. CP 24. Griffin's offender scores were 27, 31, and 43. CP 31. Griffin was sentenced to life without parole for the aggravated murder and received high end standard range sentences on his other convictions. CP 32. After he was sentenced, the Supreme Court decided *State v. Blake*, 197 Wn.2d 170, 481 P.3d 521 (2021). CP 42-43. Because three of his prior convictions were for possession of a controlled substance, remand was necessary to correct his offender score. CP 55. With the three convictions removed, his offender scores became 24, 28, and 40. RP 14; CP 71.

In a two-to-one decision, the Court of Appeals found resentencing was necessary due to the change in Griffin's offender scores. CP 55, 58. The majority reasoned that while Griffin's sentence on the aggravated murder would not change, the trial court had the discretion to give him lower sentences within his standard ranges based on his reduced offender scores.

CP 56. Because the record did not clearly indicate the trial court would impose the same sentence anyway, resentencing was necessary. CP 55-56.

In dissent, Judge Sutton agreed with the majority that remand to determine the impact of *Blake* on Griffin's offender score was appropriate but disagreed that resentencing was necessary. CP 59. Judge Sutton noted that Griffin received standard range sentences. CP 59. Judge Sutton reasoned that because Griffin's life sentence on the aggravated murder was mandatory regardless of his offender score, and his reduced offender scores on his other crimes did not change his standard ranges, resentencing was unnecessary. CP 59.

Due to the COVID-19 public health emergency, prior to Giffin's resentencing, the Supreme Court issued an order that "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." Supreme Court Order No. 25700-B-658, at 3 [hereinafter "SC



Order”].<sup>1</sup> The order also stated: “Courts should continue to hear **in custody** criminal and juvenile matters by telephone, video or other means that do not require in person attendance when appropriate.” SC Order at 7 (bold in original).

With respect to critical stages of criminal proceedings where criminal appearances were conducted telephonically or by video, the Supreme Court ordered: “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.” SC Order, at 11. Finally, to give courts the discretion to handle the ongoing emergency in a manner that was most appropriate for the given situation, the order stated: “Nothing in this Order limits the

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<sup>1</sup> The Supreme Court’s Fifth Revised Extended Order Regarding Court Operations No. 25700-B-658 was issued on February 19, 2021, and is available on the Washington Courts website at: <https://www.courts.wa.gov/content/publicUpload/Supreme%20Court%20Orders/25700-B-658.pdf>. This order remained effective until October 31, 2022, when Order No. 25700-B-697 took effect.



authority of courts to adopt measures to protect health and safety that are more restrictive than this Order, as circumstances warrant[.]” SC Order, at 14-15.

The Cowlitz County Superior Court complied with the Supreme Court’s order and entered an order of its own, stating: “All criminal in custody matters shall be heard virtually via the ZOOM platform unless otherwise ordered by the Court.” Cowlitz County Order 6-A, at 3 [hereinafter CC Order].<sup>2</sup> While these orders were in effect, the *Blake* decision reduced the offender scores of a large number of defendants and resulted in the need for many resentencing hearings. To limit potential COVID-19 exposure, the Cowlitz County Superior Court and the Department of Corrections arranged for defendants in prison, who needed *Blake* resentencing hearings, to appear via Zoom.

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<sup>2</sup> Emergency Order No. 6-A Re: Court Operations Replacing No. 5-A, is available on the Cowlitz County Superior Court website: <https://www.cowlitzsuperiorcourt.us/all-forms/331-emergency-order-no-6-a-re-court-operations/viewdocument/331>.

After the mandate from the Court of Appeals was received, the State told the Court that Griffin would need to be present for the hearing and inquired whether he should be brought from prison on a temporary removal order or appear via Zoom. RP 7. The court asked Griffin's attorney if he had any preference. RP 7. Griffin's attorney said he had no issue with Griffin appearing by Zoom. RP 7. The resentencing hearing was scheduled for September 9, 2022. RP 11.

On September 9, 2022, Griffin appeared via Zoom and confirmed with the court that he could hear what was being said.<sup>3</sup> RP 11. After the sentencing hearing began, Griffin said he needed to confer with his attorney. RP 11. The court stopped the hearing and permitted Griffin and his attorney to speak privately. RP 11-13. After Griffin conferred with his attorney privately, Griffin's attorney told the court he was ready to proceed. RP 13. Griffin's attorney then stated that although

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<sup>3</sup> Griffin also indicated he was able to observe his attorney in the courtroom. RP 11.

*Blake* resentencing hearings were “standardly done via Zoom,” Griffin was requesting to appear in person. RP 13-14. No reason was given as to why Griffin wanted to appear in person rather than via Zoom. RP 13-14.

The State noted that the court was operating under an emergency order which permitted presence over Zoom. RP 14. With the attorneys, Griffin, and the court able to observe and hear each other, and Griffin able to exercise his right of allocution, the court found that Griffin was present for the hearing. RP 14.

The parties agreed on Griffin’s new offender scores and that his standard ranges remained the same. RP 14-15. The State, Griffin’s attorney, and Griffin all addressed the court. RP 14-18. The court noted that the Legislature only considered recidivism up to an offender score of nine. RP 18-19. Even with three points removed, Griffin’s offender scores of 28 and 40

remained over three times this legislative maximum.<sup>4</sup> RP 19. Further, in addition to his juvenile history, Griffin had continued to commit felonies for 20 years as an adult prior to committing the murder. RP 19. Thus, the court found the changes to his offender scores were “miniscule.” RP 19. The court stated: “I don’t think there’s anything in the change in that score that impacts either the gravity of this case or the length and breadth of his criminal past.” RP 19. As a result, the court imposed the same sentence as it had originally—the high end of each standard range. RP 19; CP 72.

Despite receiving standard range sentences concurrent to his life sentence, Griffin appealed. The Court of Appeals affirmed the trial court’s finding that Griffin was not denied his constitutional right to be present, and also found any error was harmless. Slip Op. at 5. The Court of Appeals recognized that

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<sup>4</sup> Griffin’s offender score of 24 on his unlawful possession of a firearm in the first degree conviction remained over two-and-a-half times higher than nine. CP 24, 71.

Washington trial courts must comply with orders of the Supreme Court, “which has the inherent authority to administer justice and ensure the safety of court personnel, litigants and the public.” Slip Op. at 5.

The court explained the trial court was operating under a Supreme Court order that mandated adherence to “the most protective public health guidance” and directed using remote proceedings “whenever appropriate.” Slip Op. at 5. During the hearing, Griffin was able to see and hear participants, confer with his lawyer, and provided a full and meaningful opportunity for allocution. Slip Op. at 6. Further, the minor change to his exceptionally high offender scores would not change his life without parole sentence. Slip Op. at 6.

The trial court was operating under the authority of the Supreme Court’s order and had unique knowledge of its own courtroom and facilities. Slip Op. at 7. Therefore, it was in the best position to balance Griffin’s desire to be physically present against the risks to public health and safety. Slip Op. at 7. Under



the circumstances, the trial court reasonably exercised its discretion to hold the hearing over Zoom. Slip Op. at 8. The Court of Appeals further noted that because it is now clear the court would impose the same sentence anyway, and no further relief could be obtained in a resentencing hearing, any error was harmless. Slip Op. at 10-11.

Griffin now petitions this Court for review.

V. THIS COURT SHOULD DENY REVIEW BECAUSE THE PETITION FAILS TO RAISE GROUNDS UNDER RAP 13.4(B).

Because Griffin's petition fails to raise any of the grounds governing review under RAP 13.4(b), it should be denied. Under RAP 13.4(b), a petition for review will be accepted by the Supreme Court only:

- (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
- (2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or
- (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or



- (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

Griffin claims the Court of Appeals' decision involves a significant question of constitutional law under RAP 13.4(b)(3). He does not claim any other grounds for review under RAP 13.4(b). The Court of Appeals' decision does not involve a significant question of constitutional law. Because Griffin fails to raise grounds for review under RAP 13.4(b), review should not be granted.

A. THE COURT OF APPEALS' HOLDING, THAT GRIFFIN WAS NOT DENIED HIS RIGHT TO BE PRESENT WHEN HE APPEARED VIA ZOOM, DOES NOT RAISE A SIGNIFICANT QUESTION OF CONSTITUTIONAL LAW.

The trial court did not abuse its discretion when it found Griffin was present for the hearing. "[I]f the Court does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact." *Terminiello v. City of Chicago*, 337 U.S. 1, 37, 69 S.Ct. 894, 93 L.Ed. 1131 (1949) (Jackson, J., dissenting). Griffin's

resentencing occurred during the COVID-19 state of emergency. The Supreme Court had directed courts to hear in-custody criminal matters by means that did not require in person attendance. With Griffin appearing via Zoom, the trial court did not abuse its discretion when it found Griffin was present for the hearing. Moreover, even if the hearing had implicated Griffin's right to be present, because the result would not change, any error was harmless.

Due to the COVID-19 state of emergency, the governor "issued a number of proclamations designed to help curb the spread of COVID-19." *State v. Milko*, 21 Wn. App. 2d 279, 283, 505 P.3d 1251 (2022). Similarly, "[t]he Supreme Court ordered all courts to follow the most protective public health guidance applicable in their jurisdiction and to use remote proceedings for public health and safety where appropriate." *Id.*

"Transmission of COVID-19 is particularly concerning in the correctional setting due to the close quarters in which inmates live, the crowding, and the recirculated air." *Matter of Pers.*

*Restraint of Williams*, 198 Wn.2d 342, 348, 496 P.3d 289 (2021).

“Prisons are not designed to easily accommodate social distancing.” *Colvin v. Inslee*, 195 Wn.2d 879, 886, 467 P.3d 953 (2020). To stem the spread of COVID-19, the Department of Corrections instituted protocols reducing the volume of inmate transfers and suspended visitation and volunteer programs. *Williams*, 198 Wn.2d at 349.

In-court constitutional rights may be upheld even where those involved are not physically present in the courtroom. Remote voir dire over Zoom has been found to satisfy the right to a jury trial. *State v. Wade*, 28 Wn. App. 2d 100, 110-16, 534 P.3d 1221 (2023). And, while the face-to-face confrontation of one’s accuser is a core element of the confrontation clause, face-to-face confrontation is only a “preference.” *Milko*, 21 Wn. App. 2d at 287. The confrontation clause is not violated when a procedure without a face-to-face presence still ““ensures the reliability of the evidence by subjecting it to rigorous adversarial testing and thereby preserves the essence of effective

confrontation.”” *Id.* at 288 (quoting *Maryland v. Craig*, 497 U.S. 836, 857, 110 S. Ct. 3157, 111 L. Ed. 2d 666 (1990)).

Video testimony has been found to satisfy the confrontation clause when (1) excusing the physical presence of a witness is necessary to further an important public policy and (2) the reliability of the testimony is otherwise assured. *Id.* With regard to COVID-19, the Court of Appeals has rejected the argument that necessity could only be found when a witness has an actual health condition. *Id.* at 293. Rather, “a significant risk of contracting a virus that had killed hundreds of thousands of people was sufficient to establish necessity.” *Id.* at 294.

“Criminally accused persons have a constitutional right to be present at all critical stages of court proceedings[.]” *State v. Anderson*, 19 Wn. App. 2d 556, 561, 497 P.3d 880 (2021). However, “[t]he COVID-19 pandemic has complicated the administration of justice in innumerable ways.” *Id.* at 565. “Videoconferencing has been an essential component of continued court operations.” *Id.*

In some circumstances, virtual hearings have been found to satisfy the due process right to be present. *See Matter of Dependency of G.L.L.*, 20 Wn. App. 2d 425, 429, 499 P.3d 984 (2022). For example, while a parent has the right to be present in a termination hearing, that right is still satisfied without physical presence if the parent is “given a meaningful opportunity to be heard and defend through alternative procedures.” *Id.*

The extent to which appearing via videoconference implicates the right to be present remains an open question. *See Anderson*, 19 Wn. App. 2d at 561-62. Yet, while the right to be physically present may be waived simply by failing to object, the right to counsel cannot be lost without a specific waiver. *Id.* at 562. Thus, “courts must ensure videoconferencing occurs in a way that allows for private attorney-client consultation.” *Id.* at 565. Of course, even a constitutional violation may be overcome if shown to be harmless beyond a reasonable doubt. *See id.* at 563-64.



“[W]hile remand is the appropriate remedy when the court incorrectly calculates the standard range, that remand is unnecessary where ‘the record clearly indicates the sentencing court would have imposed the same sentence anyway.’” *State v. Chambers*, 176 Wn.2d 573, 589, 293 P.3d 1185 (2013) (quoting *State v. Parker*, 132 Wn.2d 182, 189, 937 P.2d 575 (1997)). “Where the standard sentencing range is the same regardless of a recalculation of the offender score, any calculation error is harmless.” *State v. Priest*, 147 Wn.App. 662, 663, 196 P.3d 763 (2008) (quoting *State v. Fleming*, 140 Wn.App. 132, 138, 170 P.3d 50 (2007)). “A case is moot when it involves only abstract propositions or questions, the substantial questions in the trial court no longer exist, or a court can no longer provide effective relief.” *Spokane Research & Defense Fund v. City of Spokane*, 155 Wn.2d 89, 99, 117 P.3d 1117 (2005).

Here, the trial court did not abuse its discretion by finding Griffin was present for the hearing when he appeared via Zoom. Due to the unique circumstances of the COVID-19 public health



emergency, the Supreme Court had ordered trial courts to hold hearings virtually. The Supreme Court contemplated this would include critical stages of criminal proceedings, as its order specifically required courts to ensure defendants would “have the opportunity for private and continual discussion with their attorney.” The Supreme Court would not have directed courts to hold critical stages of the trial process with defendants present via videoconference if this was a *per se* violation of the right to be present.

Although Griffin was not physically in the courtroom, he was still present for the hearing because the essence of his right to be present was preserved. Through Zoom he was able to observe and hear both the attorneys and the court, and they were able to observe and hear him. He was able to inform the court he wished to speak with his attorney and then was able to do so privately. He was present when both the prosecutor and his attorney gave their sentencing recommendations. He was given the opportunity for allocution. He was also present when the

judge pronounced his sentence and explained the reasons for that sentence. Thus, as in *Milko*, where virtual testimony did not violate the confrontation clause, Griffin's right to be present was not violated when he was present for the entire hearing via Zoom.

The court had to balance Griffin's right to be present with the practical realities of the ongoing public health emergency. When the essential functions of the hearing could be provided over Zoom, it made little sense to bring Griffin from prison and increase the risk of COVID-19 exposure entering the Cowlitz County Jail, courts, or prison where Griffin was housed. The court was best positioned to determine the public health risks involved and whether the core functions of the hearing could be satisfied with Griffin appearing through videoconference. Further, this authority to use its discretion was given to the court by the Supreme Court's order.

Griffin received the same accommodations he would have if physically present. When Griffin asked for his attorney, the court made sure he had the opportunity to speak privately with

his attorney. After Griffin and his attorney had the opportunity to speak, the court did not proceed until Griffin's attorney announced they were ready. Thus, the court ensured that during a critical stage of the proceedings, videoconferencing occurred in a way that allowed for private attorney-client consultation. With all parties able to observe and hear one another, and Griffin given the opportunity for allocution, he was "given a meaningful opportunity to be heard."

At the time of the hearing, the court was still operating under the Supreme Court's order and its own emergency order. There was a significant risk that holding in-person hearings would spread a virus that has now killed millions. Because protecting against the spread of the virus was necessary and videoconferencing was a reliable method for the type of hearing at issue, the court was justified in holding the hearing with Griffin appearing via Zoom, even over Griffin's objection. Thus, the court did not abuse its discretion in finding Griffin was present for the hearing.

Additionally, even if Griffin had been physically in the courtroom, the result of the hearing would have been the same; thus, any error is harmless beyond a reasonable doubt. Griffin's offender scores of 40, 28, and 24, far exceed the maximum of nine. Because of his high offender scores, at Griffin's first sentencing hearing, the trial considered giving him the statutory maximum on each crime, saying Griffin "richly deserved" the absolute maximum for every count.<sup>5</sup> Now, the court has unequivocally stated that the "miniscule" reduction in Griffin's offender scores did not change its decision to sentence him to the high end of each standard range. If sentencing were to occur for a third time, the result would be the same. Thus, even if the court had abused its discretion in finding he was present when he

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<sup>5</sup> Ironically, at the original sentencing the trial court said it would not exceed the standard ranges to avoid the potential of an appellate issue.

appeared via Zoom, any error is harmless beyond a reasonable doubt.<sup>6</sup>

## VI. CONCLUSION

Because the petition does not meet any of the considerations governing acceptance of review under RAP 13.4(b), it should be denied.

### CERTIFICATE OF COMPLIANCE

I certify under RAP 18.17(b) that excluding appendices, title sheet, table of contents, table of authorities, certificate of compliance, certificate of service, signature blocks, and pictorial images, the word count of this document is 3,391 words, as calculated by the word processing software used.

Respectfully submitted this 24<sup>th</sup> day of June 2024.



Eric H. Bentson, WSBA #38471  
Deputy Prosecuting Attorney

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<sup>6</sup> Avoiding further unnecessary resentencing hearings also has value in providing closure to the murder victim's family.

## CERTIFICATE OF SERVICE

I, Michelle Sasser, do hereby certify that the Response to Petition for Review was filed electronically through the Supreme Court Portal and which will automatically cause such filing to be served on the opposing counsel listed below:

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I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Kelso, Washington on June 24<sup>th</sup>, 2024.

Michelle Sasser  
Michelle Sasser



# COWLITZ COUNTY PROSECUTING ATTORNEY'S OFFICE

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## Transmittal Information

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