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**Subject:** FW: Comment to proposed CrR 3.4 - presence of the defendant  
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**From:** Carlstrom, Carla [mailto:Carla.Carlstrom@kingcounty.gov]  
**Sent:** Thursday, September 30, 2021 3:19 PM  
**To:** OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>  
**Subject:** Comment to proposed CrR 3.4 - presence of the defendant

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To Honorable Members of the Washington Supreme Court:

I am writing to strenuously object to the proposed changes to CrR 3.4 allowing remote video presence of defendants at arraignments, testimonial hearings, trials and sentencings. I have been a criminal prosecutor for 24 years in the King County Prosecutor's Office. I have tried over 100 jury trials. I have also spent 6 years handling criminal appeals. This proposal is a mistake as it will lead to reversible error and also prevent jurors from properly evaluating the credibility of defendants who choose to testify.

Under this new proposal, allowing a defendant to appear by video in their own trial, there is a high risk that Defendants will be able to successfully bring appellate issues. For example, they can raise a Constitutional Confrontation Clause issue if they assert that due to their connection or the way the camera was pointed or the distance that they missed key testimony and, therefore, weren't able to confront witnesses. Similarly they can bring issues of not being "present" at their trials if the video and audio connections stop working. Sometimes these connections might not be discovered until long after certain witness testimony is completed so that it will either have to be re-done (which means a jury has to be instructed to disregard the first testimony and only listen to it the 2<sup>nd</sup> time) or it may not be able to be recreated at all. Or such problems may not be discovered until long after the trial is over.

Furthermore, as much as video technology has assisted during times of Covid, it is not a replacement for in-person, live witness and defendant testimony. There is no way that watching a trial through video gives a defendant the same ability to fully evaluate what is happening in every aspect of the courtroom. Similarly, there is no way that seeing a defendant on a video screen (even if that occurs when he/she is not testifying) can replace the juror's ability to evaluate a defendant during trial. Most importantly, a defendant testifying via video is simply not going to give the same opportunity

for a jury to evaluate him/her as a live presence would. Criminal trials involve loss of liberty, the highest constitutional loss short of death. Any criminal defendant has a right to fully be present at and view their trial and testify live to a jury. Nothing can replace being in a witness box and being able to make personal contact with a jury. And, from a prosecution perspective, cross-examining a defendant via video causes delays, is not as effective, and runs the risk that Defendants have distractions or other information before them during testimony.

The biggest concern I want to emphasize is the constitutional concerns this process raises. This is the reason that even while juries in King County and other courts are being selected by Zoom, criminal trials are taking place in person as they should be.

I urge this Court not to adopt this proposal.

Sincerely,

*Carla B. Carlstrom*  
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