From: OFFICE RECEPTIONIST, CLERK
To: Linford, Tera
Subject: FW: Comment Court rule 3.4
Date: Thursday, September 30, 2021 3:01:52 PM

From: Martin, David (PAO) [mailto:David.Martin@kingcounty.gov]
Sent: Thursday, September 30, 2021 3:01 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Cc: Kaake, Angela <Angela.Kaake@kingcounty.gov>; Maryman, Bridgette <Bridgette.Maryman@kingcounty.gov>
Subject: Comment Court rule 3.4

We are writing to express serious concern with the new proposed rule CrR 3.4 – Presence of Defendant. We join in our colleagues' concerns about the general implications of the proposed revisions. The proposed changes raise significant practical, policy and legal issues. We also share concerns that the rule changes are not necessary because the prior amendment to CrR 3.4 significantly limits the times when defendants must appear in person. As supervisors for domestic violence cases in King County, we write separately to share our concerns about how these changes may impact DV cases.

During the pandemic, our criminal justice system made compromises to remote proceedings to remain functional, recognizing such hearings were a poor facsimile of proceeding in person. Although some remote proceedings for simple administrative tasks could be efficient, they could also cause significant delay with document exchange, interpreters, outdated courtrooms, inconsistent technology, and inequitable access. It is telling that King County Superior Court has reverted to paper documents to operate its most high-volume proceedings, even when some participants are remote. Problems grew exponentially with the seriousness of the proceedings. The attempts at fully remote felony trials were unsuccessful and not worth the resources required to implement such options. Remote proceedings are less formal, less serious, and less meaningful than in-person proceedings. Having formal, serious, and meaningful proceedings is critical in our practice of domestic violence, sexual assault, and violent crime cases. Even arraignment, for which remote proceedings have sometimes been allowed, poses serious public safety questions for judicial officers from release issues, no contact orders, and firearm surrender. We have seen the problems with taking proceedings less seriously in cases of domestic violence. Witness tampering and intimidation by DV perpetrators is not a new issue and has been recognized by the U.S. Supreme Court, "This particular type of crime is notoriously susceptible to intimidation or coercion of the victim to ensure she does not testify at trial." 547 U.S. 813 (2006), see also *Interpersonal processes associated with victim recantation*, *Social Science & Medicine* (2011). Permitting remote proceedings diminishes the security, dignity, and seriousness of the court process and permits greater obstruction of the administration

of justice.

Given this, we are concerned that allowing defendants to appear remotely for hearings such as arraignment, trial, and sentencing will put victims in a position where they do not feel safe to exercise their rights. Victims have a basic and fundamental right to be involved in the court process.
The Washington State Constitution – Article 1, Section 35 …"ensure[s] victims a meaningful role in the criminal justice system and to accord them due dignity and respect, victims of crime are hereby granted the following basic and fundamental rights."… "a victim of a crime charged as a felony shall have the right to be informed of and, … attend trial and all other court proceedings the defendant has the right to attend, and to make a statement at sentencing and at any proceeding where the defendant's release is considered…" In addition, prosecutors and judges cannot assure the safety of the victim, as the perpetrator may be logged in remotely in the other room. https://www.washingtonpost.com/dc-md-va/2021/03/12/mary-lindsey-coby-harris-zoom-hearing/ and https://www.kiro7.com/news/trending/mans-zoom-court-hearing-ends-with-handcuffs-after-hes-found-attending-victims-home/GPHIUF67DNDUFDQHOGX6NY25RE/ Victims have a right to freely speak during certain proceedings, free from the coercive control of the defendant/perpetrator. Remote appearance can put victims in unsafe situations. Nobody knows what happens when the cameras turn off.

Court rules must not forget the victim's rights and interests. A deprivation of these rights will not be excused by administrative inconvenience and logistical difficulty. *Cf. Wolfish v. Levi*, 573 F.2d 118, 127 (2d Cir. 1978), rev'd sub nom. Bell v. Wolfish, 441 U.S. 520, 99 S. Ct. 1861, 60 L. Ed. 2d 447 (1979) (finding that administrative inconvenience can never excuse the deprivation of constitutional rights). Nor should a deprivation of victim rights be excused by administrative convenience. The rule change presents serious constitutional issues. In the past, appellate courts and the Legislature have held the State to a high standard in producing remote testimony in a narrow group of cases involving children--even when that remote testimony is grounded in sound reasoning and a solid record. Here, the rule's only apparent rationale is convenience, and no record is required as a precursor for substantive proceedings. The confrontation clause states that "in all criminal prosecutions, the accused shall enjoy the right … to be confronted with the witnesses against him." *132 U.S. Const. amend. VI. Without question, the confrontation clause represents a strong preference for live testimony, including the right to subject a witness to cross-examination. State v. Rohrich, 132 Wash.2d 472, 477–78, 939 P.2d 697 (1997); State v. Smith, 148 Wn.2d 122, 131–32, 59 P.3d 74, 79 (2002). The proposed rule makes no provisions for a defendant to even be present if they testify at their own trial, thus not allowing jurors to make a full determination of credibility. The court is affording defendants more rights than those of victims and witnesses. While both are important, sacrificing the rights of victims for administrative convenience is unfair and unjust. Finally, hearings such as arraignment and sentencing—where Courts decide custody status, conditions of release, and NCOs, can often be heated and trigger safety concerns for victims and the broader community. Requiring a defendant to be present at such hearings provides a critical time for a defendant to react to bad news in a safe, measured way. Such a "cooling off" moment is not possible with remote arraignment, trial, or sentencing. For these reasons, and the reasons cited by our colleagues, we urge the Court to reject the most-recently proposals to modify CrR 3.4.

Sincerely,

David Martin, Angie Kaake, and Bridgette Maryman
KCPAO DV Unit