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September 29, 2021

Clerk of the Supreme Court
Temple of Justice
P.O. Box 40929
Olympia, WA 98504-0929

Re: Proposed Amendments to CrR 3.4

Dear Justices of the Supreme Court,

I write in opposition to the proposed amendments to CrR 3.4 submitted for comment in June 2021, which would allow remote appearances by defendants for all Superior Court proceedings in criminal cases. Remote appearance by the defendant for testimonial hearings, trials, guilty pleas, and sentencing is contrary to the interests of defendants and the courts. A thorough review of all of the consequences should be undertaken before such a radical reconstruction of the criminal justice system is adopted by court rule.

It is a useful exercise to recall a criminal trial that one has observed and imagine the defendant out of the courtroom and in their own home. Based on my 30 years as a prosecutor and recent experience with remote proceedings, I will offer some issues that I believe will arise.

How would remote appearance affect the defendant's experience of the trial? It deprives the defendant of the opportunity to consult with their attorneys privately during the proceedings. It deprives the defendant of the opportunity to confront the witnesses and effectively observe their demeanor. It deprives the defendant of access to the exhibits offered. It deprives the jury of the opportunity to observe the defendant's demeanor during remote testimony by the defendant. It deprives the defendant of the opportunity to observe the jurors' reactions to testimony.

Everyone who participates in meetings via Zoom understands that it is more difficult to focus on the content of the meeting, particularly if there are any distractions in the remote environment. It is often difficult to hear, and some words are lost because only one speaker at a time is audible. Photos, videos, or text that is displayed is often difficult to decipher, impossible on a small screen. As a result, a defendant appearing remotely will not be able to perceive and understand the proceedings as well as one who is physically present. A defendant who has not experienced a trial may well agree to remote appearance not understanding what will be lost by doing so.

How would a defendant's remote appearance for trial affect the trial court? It certainly would not expedite the proceedings or decrease court congestion. Technical problems cause endless delays. Attempting to allow the defendant to observe all aspects of the trial, including exhibits, will cause further delay. If the defendant's internet connection is lost, the trial must come to a halt. Of course, the court may not know immediately when that occurs, so some portion of the proceedings must be repeated but it may not be clear what the defendant has missed. Ensuring that the defendant actually has the opportunity to observe the entire proceeding is an extreme

obstacle. And what will the court do if the defendant's children appear on camera? What if it appears that the defendant is speaking to someone else in the room? What if other people appear on camera during witness testimony who may intimidate the witness? The prospects of improper influence, generating sympathy, and provoking mistrial must be considered.

Outside influences in a remote environment are also a substantial issue when a defendant enters a guilty plea. How can the court ensure that a plea is voluntary when it cannot know who may be present off-camera? The defendant also may be reluctant to call the proceedings to a halt by asking to consult with their lawyer, and defendants are more likely simply not to ask questions. A remote appearance may be a reasonable accommodation for a defendant whose appearance in court for a guilty plea or sentencing would be an excessive burden – the current rule permits that on agreement of the parties and the court.

Remote appearances at sentencing also would diminish the defendant's understanding of the proceedings and the court's sentence. Papers are now handed to the defendant explaining their rights on appeal and collateral attack, voting rights, the requirements for sex offender registration, and the details of orders prohibiting contact with victims, among other things. None of those papers can be handed to a defendant who appears remotely, and reading all of these documents on the record would delay proceedings so much that courts will not do so. It is critical that the defendant be aware of the information provided in these documents and there is no way to ensure that defendants receive them if they are not present in court. Of course, at a felony sentencing, the defendant must provide fingerprints in court, so that criminal convictions can be attributed to the correct person and criminal history accurately recorded.

Finally and not least, this proposal perpetuates inequities in the criminal justice system. It will result in those who are privileged enjoying even more privilege. For those who are economically disadvantaged or who require interpreters of any kind, the option of remote participation would be another privilege that they cannot enjoy. (Remote simultaneous interpretation is impossible unless the interpreter is required to be in the defendant's home for the proceedings, which I expect interpreters would find an unacceptable option.) For victims and other witnesses, the defendant's privilege to appear remotely will be experienced as an additional injury, as witnesses will continue to be required to appear in court while the defendant sits comfortably at home and victims will not be able to address the defendant in person at sentencing.

This radical proposition is justified with the statement that the reduction in required court appearances by defendants "should decrease daily court congestion and allow for a more expeditious case resolution while improving access to justice." There is no evidence offered in support of this assertion. To the contrary, these amendments would diminish the rights of defendants and interfere with the administration of justice.

Respectfully,



Donna Wise
Senior Deputy Prosecuting Attorney

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[Donna Wise comment to CrR 3.4 proposal.pdf](#)

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I have attached my comment on the June 2021 proposed amendments to CrR 3.4.
Thank you.



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