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Subject: FW: Comments on Proposed Amendments to CrR 3.4
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From: Joseph, Jennifer [mailto:Jennifer.Joseph@kingcounty.gov]
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Thank you for the opportunity to comment on proposed amendments to CrR 3.4, permitting the Defendant to appear by video or phone for criminal proceedings. Because the proposals have the potential to seriously erode the Defendant's constitutional rights, they will be the source of countless reversals and retrials. This serves no one, especially when our courts are clawing their way out of the historic pandemic-caused criminal backlog.

Over a year into the pandemic, many of us have far more experience with remote conference technology than we ever wanted. Video feeds stall, networks freeze, audio quality waxes and wanes, and people talk over each other so that no one can hear anyone. Dogs and babies and garbage trucks and sirens interrupt randomly. This might be merely an annoyance in meetings and trainings—but when it happens during a trial, it will degrade the Defendant's opportunity to observe, understand, and participate in court proceedings. Convicted defendants will appeal based on alleged violations of the right to confrontation, or effective assistance of counsel, or for any number of other constitutional violations that will predictably arise when Defendants with the means to appear remotely—i.e., those who are out of custody, possess a technologically adequate device and knowledge of how to use it, have reliable internet access, and do not require interpretation—are treated differently than those who do not.

Allowing the Defendant to appear remotely threatens his or her ability to freely confer with counsel. The Defendant will be at a disadvantage if he or she is unable to personally inspect exhibits or to clearly observe the nonverbal communication of a witness who might appear only on one-quarter of a tiny cell-phone screen. A Defendant who does not speak English will encounter even more difficulty, forcing the trial court to cobble together a technological fix to allow the defendant, interpreter, and counsel to confer in private. Further, it will be more difficult to ensure that a Defendant is acting intelligently and voluntarily when pleading guilty or waiving other constitutional rights remotely, especially by phone, because the court cannot know if anyone off camera is exerting

influence. This problem is exacerbated by the proposed rule allowing counsel to affix “/s/” in lieu of the Defendant’s signature.

The current rule already allows remote appearances for short, nontestimonial proceedings. If video appearances are necessary for other proceedings, the rule already allows it by agreement of the parties, with permission of the court. This is sufficient to enable the court and parties to take advantage of teleconference technology when necessary and ensures that the court and parties think through the practical and constitutional implications of proceeding in this fashion, including how to make a sufficient record to refute inevitable constitutional claims on appeal. The proposed amendments may offer certain privileged Defendants convenience, but this courtesy—notably one not being offered to victims of crime—will come with tremendous potential for wasted time, constitutional error, and abuse. Because the current rule already affords trial courts with flexibility to use videoconference and telephone when necessary and the proposed amendments will be impracticable at best and unjust at worst, this Court should reject the amendments.

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