



Department of
PUBLIC DEFENSE

Anita Khandelwal

Director

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September 30, 2021

Clerk of the Supreme Court
P.O. Box 40929
Olympia, WA 98504-0929
VIA EMAIL: supreme@courts.wa.gov

RE: Proposed Changes to CrR 3.4

Dear Court Rules Committee:

The King County Department of Public Defense (DPD) appreciates the opportunity to comment on the proposed amendment to CrR 3.4. In short, DPD supports the simplifying and clarifying language that the proposed amendment offers. The recent changes to CrR 3.4 have provided important flexibility and choice to individuals, who are presumed innocent, that have been charged with crimes.¹ Offering a range of options by which to appear is a significant step towards mitigating the disruption of a criminal charge upon an individual's life.² Many of our indigent clients already face significant challenges with housing, employment, transportation, childcare, substance abuse, and mental health, and frequent appearances in court to avoid a bench warrant only result in further disruption. The exhaustion and frustration that our clients experience from repeated administrative court hearings is known to result in premature pleas driven by the client's need to end the process. "[T]he real punishment for many people is the pretrial process itself; that is why criminally accused invoke so few of the adversarial options

¹ Some of the comments submitted in opposition to this proposed amendment characterize CrR 3.4 as a "privilege" not afforded to others within the criminal legal system. DPD is unaware of any hearings under the current or proposed rule that would permit remote appearance by the individual accused but require in-person appearance by another participant, such as the alleged victim.

² It is critical to bear in mind that these harms disproportionately impact the poor and communities of color. Washington State data from 2019 shows that Black members of the community were arrested at a rate more than four times the arrest rate for white individuals. See Lauren Knoth, Ph.D., *Disparity and Disproportionality in the Criminal Justice System*, Washington State Institute for Public Policy, 9/11/20 at Slide 24 (available at https://sgc.wa.gov/sites/default/files/public/SGC/meetings/2020/SGC_disparity_in_CJ_WSIPP.pdf).

available to them.”³ Providing flexibility in the manner of appearance is especially important as overwhelming case backlogs continue to hamper courts across our state.⁴

At the same time, DPD writes to highlight two areas of concern. First, we urge the Court to maintain in-person proceedings as the baseline presumption for incarcerated individuals. We propose that CrR 3.4 be modified to add a sentence in the general section stating that “A defendant who is in custody may not be compelled to attend a hearing remotely unless the Court finds that extraordinary, time-limited circumstances (like facility issues related to weather) require a remote appearance and that the remote appearance will not interfere with or diminish any constitutional, statutory, or rule-based right of the accused.”⁵

Research shows that compelled remote appearance for incarcerated individuals results in worse outcomes for the accused. The most comprehensive study to date comparing outcomes of remote versus in-person custodial hearings examined more than 600,000 bail decisions over 15 years in Cook County, Illinois.⁶ That study revealed staggering disparities in outcome, with average bail amounts increasing across different charges by 50 to 90% for those heard remotely.⁷ When these statistics were made public, the offending court—which had been using remote bail hearings for more than eight years and defending the practice in a civil suit for more than two years—agreed to abandon it within days and returned entirely to in-person hearings.⁸

This research is consistent with the experience of judges across the country. As the Sixth Circuit has explained, “[b]eing physically present in the same room with another has certain tangible and difficult to articulate effects that are *wholly absent when communicating by video conference*.”⁹ Or as the Third Circuit has concluded, “even in an age of advancing technology, watching an event on the screen remains less than the complete equivalent of actually attending it.”¹⁰ Individuals detained pretrial are already enormously disadvantaged as compared to those who are not held.¹¹ They must not be further burdened by compelled remote appearance absent the above proposed standard being satisfied.

Next, with respect to language interpretation, DPD urges the Court to ensure that interpreters appear next to an individual appearing in person for their hearing and next to an incarcerated individual appearing in person or by video.¹² The very first canon of professional

³ MALCOLM M. FEELEY, *THE PROCESS IS THE PUNISHMENT* 241 (1979).

⁴ See David Kroman, *Washington's Legal System Severely Backlogged Following Pandemic*, CROSSCUT, June 2, 2021 (available at <https://crosscut.com/news/2021/06/washingtons-legal-system-severely-backlogged-following-pandemic>).

⁵ DPD has incorporated this proposed language into section (e)(1) of the pending proposed rule change (highlighted for clarity), and a draft is attached to this comment.

⁶ Shari Seidman Diamond, et al, *Efficiency and Cost: The Impact of Videoconferenced Hearings on Bail Decisions*, 100 J. Crim. L. & Criminology 869, 886–87 (2010).

⁷ *Id.* at 893.

⁸ See *id.* at 870.

⁹ *U.S. v. Williams*, 641 F.3d 748, 764–65 (6th Cir. 2011) (emphasis added).

¹⁰ *U.S. v. Lawrence*, 248 F.3d 300, 304 (4th Cir. 2001).

¹¹ See generally Léon Digard, *Justice Denied: The Harmful and Lasting Effects of Pretrial Detention*, Vera Institute of Justice, April 2019 (available at <https://www.vera.org/downloads/publications/Justice-Denied-Evidence-Brief.pdf>). The report presents studies showing that those detained pretrial are more likely to be convicted, likely to receive a longer sentence, and more likely to return to the criminal legal system than those not held. See *id.* at 3–6.

¹² DPD’s proposed language appears in the attached draft at section (e)(4)(a), again highlighted for clarity.

responsibility for our court interpreters is accuracy: “Interpreters must reproduce in the target language the closest natural equivalent of the source language message without altering it by means of addition, omission, or explanation.”¹³ This is “to place limited English proficient individuals on an equal linguistic footing with those who are fully proficient in English.”¹⁴ Language interpretation is a nuanced skill which relies on observation of both verbal and non-verbal communication.¹⁵ Our rules reflect the plain advantage of in-person interpretation, requiring that in legal proceedings “the interpreter shall appear in person unless the Court makes a good cause finding that an in-person interpreter is not practicable, and where it will allow the users to fully and meaningfully participate in the proceedings.”¹⁶ In-person interpretation also greatly furthers efficiency, as private conversations between client and counsel can happen easily and without the disruption of a private breakout room within an online platform. In-person interpretation should be the baseline presumption for individuals who appear in-person, and for individuals held in custody.

DPD continues to support efforts to reduce the harm and disruption associated with the mere filing of a criminal charge against an individual who remains presumed innocent. Given the irrefutable fact that these harms are borne disproportionately by the poor and communities of color, we must not retreat from the progress CrR 3.4 has already made. DPD supports the proposed amendment with the inclusion of the protections noted herein.

Sincerely,

A handwritten signature in black ink, appearing to read 'Anita Khandelwal', with a long horizontal flourish extending to the right.

Anita Khandelwal
Director

¹³ GR 11.2(f)(1).

¹⁴ *Id.* at comment [1].

¹⁵ Our General Rules recognize that “inability to see a speaker” is a “condition that impedes [the interpreter’s] ability to accurately interpret.” *Id.* at comment [3].

¹⁶ GR 11.3(a).

CrR 3.4

PRESENCE OF THE DEFENDANT

(DPD's proposed language highlighted)

(a) – (d) [Unchanged.]

(e) Videoconference Proceedings Remote Appearances.

(1) *In General.* A defendant may appear remotely through video or telephonic conferencing as available in each court and indicated in this rule. A defendant who is out of custody and wishes to appear remotely is responsible for his or her own device and internet access to connect to court. A defendant who is in custody may not be compelled to attend a hearing remotely unless the Court finds that extraordinary, time-limited circumstances (such as facility issues related to weather) require a remote appearance and that the remote appearance will not interfere with or diminish any constitutional, statutory, or rule-based right of the accused.

(2) *Authorization.* Remote appearances are authorized for all criminal proceedings except for arraignment, all phases of a trial, entry of a guilty plea, and sentencing for which the defendant must have prior court approval permitting a remote appearance. Preliminary appearances held pursuant to CrR 3.2.1, arraignments held pursuant to this rule and CrR 4.1, bail hearings held pursuant to CrR 3.2, and trial settings held pursuant to CrR 3.3, may be conducted by videoconference in which all participants can simultaneously see, hear, and speak with each other. Such proceedings shall be deemed held in open court and in the defendant's presence for the purposes of any statute, court rule or policy. All remote videoconference hearings conducted pursuant to this rule shall be public, and the public shall be able to simultaneously see and hear all participants and speak as permitted by the trial court judge. Any party may request an in-person hearing, which may in the trial court judge's discretion be granted.

(3) *Remote Appearances Required by Video.* Remote appearances at arraignments, testimonial hearings, trials, sentencing, and whenever the defendant is in-custody shall include video. Local court rules may require all remote appearances take place over video.

~~(2) *Agreement.* Other trial court proceedings including the entry of a Statement of Defendant on Plea of Guilty as provided for by CrR 4.2 may be conducted by videoconference only by agreement of the parties, either in writing or on the record, and upon the approval of the trial court judge pursuant to local court rule.~~

~~(3) (4) *Standards for Remote Appearances Videoconference Proceedings.*~~

(a) *Video Appearances.* The judge, counsel, all parties, and the public must be able to see and hear each other during proceedings, and speak as permitted by the judge. The video and audio should be of sufficient quality to ensure that the video and audio connections are clear and intelligible participants are easily seen and understood. Videoconference facilities Platforms, court procedures, or in-custody facilities must provide for allow confidential communications between attorney and client, including a means during the hearing for the attorney and the client to read and review all documents executed therein, and security sufficient to protect the safety of all participants and observers when conducted in a custodial environment. For purposes of videoconference proceedings, t The electronic,

scanned, or facsimile signatures of the defendant, counsel, interested parties, and the court shall be treated as if they were original signatures. This includes all orders on judgment and sentence, no contact orders, statements of defendant on pleas of guilty, and other documents or pleadings as the court shall determine are appropriate or necessary. Defense counsel or the court may affix a “/s/” on any documents except a judgment and sentence to indicate the defendant’s signature when the defendant indicates their approval during the hearing. In interpreted proceedings where the defendant is out of custody and appearing by video, the interpreter must be in a location or over a platform where the defendant and defense attorney can have confidential conversations through the interpreter. In interpreted proceedings where the defendant is in custody and appearing by video, the interpreter must be located next to the defendant. For hearings at which the defendant appears in person, the interpreter must be located next to the defendant. ~~the interpreter must be located next to the defendant and t~~ The proceeding must be conducted to assure that the interpreter can hear all participants. When the public appears remotely, members of the public need not enable their video to be visible to other participants absent a finding of good cause and order of the court.

(B) Telephonic Appearances. If parties appear remotely with only an audio connection, the connection should be of sufficient quality to ensure participants are clearly audible. Telephonic appearances shall otherwise have the same requirements as indicated for video appearances.

(f) Remote Videoconference Proceedings under RCW 10.77.

(1) *Authorization.* Proceedings held pursuant to chapter 10.77 RCW may be conducted by video conference using the same safeguards in CrR 3.4(e)(4)(a). ~~in which all participants can simultaneously see, hear, and speak with each other except as otherwise directed by the trial court judge.~~ When these proceedings are conducted via by video conference, it is presumed that all participants will be physically present in the courtroom except for the forensic evaluator unless as otherwise provided by these rules, or as excused or excluded by the court for good cause shown. Good cause may include circumstances where at the time of the hearing, the court does not have the technological capability or equipment to conduct the conference by video as provided in this rule. Such video proceedings shall be deemed held in open court and in the defendant’s presence for the purposes of any statute, court rule, or policy. All videoconference hearings conducted pursuant to this rule shall be public, and the public shall be able to simultaneously see and hear all participants and speak as permitted by the trial court judge. Five days prior to the hearing date, any party may request the forensic evaluator be physically present in the courtroom, which may in the trial court judge’s discretion be granted.

(2) *Standards for ~~Videoconference Remote Proceedings under Chapter 10.77 RCW.~~* These proceedings shall use the same standards enumerated in CrR 3.4(e)(4)(a). ~~The judge, counsel, all parties, and the public must be able to see and hear each other during proceedings, and speak as permitted by the judge. Videoconference facilities must provide for confidential communications between attorney and client and security sufficient to protect the safety of all participants and observers. In interpreted proceedings, the interpreter must be located next to the defendant and the proceeding must be conducted to assure that the interpreter can hear all participants.~~

From: [OFFICE RECEPTIONIST, CLERK](#)
To: [Linford, Tera](#)
Subject: FW: King County Dept. of Public Defense - Comment to proposed CrR 3.4 amendment
Date: Thursday, September 30, 2021 3:40:42 PM
Attachments: [King County DPD Comment to proposed CrR 3.4 amendment.pdf](#)

From: Flaherty, Brian [mailto:Brian.Flaherty@kingcounty.gov]
Sent: Thursday, September 30, 2021 3:24 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
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Good afternoon,

The King County Department of Public Defense submits the attached comment for consideration, pertaining to the proposed amendment to CrR 3.4. Thank you very much,

Brian Flaherty