

COMMENTS ON PROPOSED AMENDMENTS TO CrR 3.4

There are numerous concerns that the Kittitas County Prosecuting Attorney's Office has regarding the proposed amendments to CrR 3.4 which will allow a defendant to appear remotely for all court proceedings. However, for the purposes of these comments we will focus on only two of them. The first is the ability of a defendant and defense attorney to communicate and the practical impact this will have on testimonial hearings. Second, and perhaps the most important, the effect this will have on victims.

During testimonial hearings, especially trial, the physical presence of a defendant is crucial. The defendant not only has the right to assist their attorney in the presentation of their case but a need to do so. A defense attorney cannot provide adequate and zealous representation of a defendant if they do not have the ability to freely communicate with them. It is common for attorneys and their clients to speak with each other or pass notes back and forth during testimony, argument, jury selection, and every other step of the process. If the defendant is not present in person these communications cannot happen.

Under the proposed amendments a recess would need to be taken every time an attorney and defendant need to speak with each other. It will not matter if it is a lengthy, in-depth conversation or a simple one sentence question. This will require the jury to be removed from the courtroom and a delay in the proceedings to take place. It could also require all other people to be removed from the courtroom so the attorney can speak to their client over the video or telephone system being used by the court. In the alternative, the attorney would need to leave the courtroom, and perhaps even the courthouse, to find a private location to speak with their client through their own phone or video methods. This will exponentially delay all matters.

The delay will not only affect the ongoing trial or hearing. In small jurisdictions that have only one courtroom or judge such delays could push trials into additional days and times where other matters are scheduled to be heard. The domino effect of this will cause widespread delays to all hearing and prevent other cases from being addressed in a timely manner.

In addition, the inability for a defendant and attorney to communicate in real time could cause miscommunication. It will be difficult, if not impossible, for an attorney to know if their client fully understands what is being relayed to them. Physical cues that are perceptible only in person will be lost. The unavoidable time lag between when a need to communicate arises and the time it can be done could lead to defendants or attorneys forgetting or misremembering the context of what was going on at that moment, the actual question or

information they need to relay, or the exact information from other parties (attorneys, witnesses, the court, etc.) that necessitated the delay in the first place.

The issues resulting from a lack of ability to freely communicate between a defendant and their attorney do not end with the trial. These issues will result in a flood of appeals based on a claim of ineffective assistance of counsel. This will cause an even greater backlog of matters in the Court of Appeals and, ultimately, in the Supreme Court. Even if a large number of these appeals are not successful, experience tells us that will not prevent them from being filed. But there can be no doubt that some of these appeals will be deemed to have merit. As a direct result of the proposed amendments the successful number of appeals for claims of ineffective assistance of counsel will be greater than they are currently. That could lead to more cases being overturned and remanded back for retrial or other hearings, further clogging the court system.

Cases overturned on appeal, especially for avoidable issues, not only create a strain on the courts, defendants, prosecutors, and county finances, they are the hardest on the victims. They prevent closure and reopen old wounds that should be allowed to heal. The rights of victims must not be ignored when making this decision to amend CrR 3.4

One of the most difficult things a victim can do is report a crime. Their trauma is then extended by interviews with law enforcement and attorneys for the State and defense. Then, finally, after already lengthy delays they are forced at trial to face the person they have accused. For some victims this is an almost impossible task. However, for many facing the person that victimized them is a cathartic experience. This is also true of the victim's family members. For all practical purposes, not requiring the defendant to be present during that process deprives the victim from having that ability. A defendant has the right to confront their accuser. Does a victim not have a right to confront the person they are accusing?

If a defendant is not required to be present at the hearings outlined in the proposed amendments a double standard is created. This could lead victims to believe that the defendant is being given special treatment that they cannot receive and create resentment. That, coupled with an increased number of cases being overturned and revictimization occurring, could result in a loss of confidence in the judicial system by victims and the public at large. This will have a chilling effect on the reporting of crimes, especially for cases of domestic violence and sexual assault. United States Supreme Court Justice Benjamin Cardozo said it best, "But justice, though due the accused, is due the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true." Snyder v Massachusetts, 291 US 97 (1934). There is no balance in the proposed amendments to CrR 3.4.

These are simply two examples of the many issues with the proposed amendments. We have not even addressed things such as verifying the identity of the defendant, obtaining defendant fingerprints to ensure the information gets into criminal databases, significant technical issues that will result, the lack of resources for defendants to call or video into court, the lack of resources for courts (especially small jurisdictions) to have video access that would be adequate, the fact finder's ability to observe the demeanor of the defendant, the defendant's ability to view documents or evidence, along with many others. As a result of all of these concerns the Kittitas County Prosecuting Attorney's Office is strongly opposed to the proposed amendments to CrR 3.4.

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Attached are comments on the proposed amendments to CrR 3.4 from the Kittitas County Prosecuting Attorney's Office.

Thank you.

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