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Subject: FW: Opposition to proposed rule change to CrR 3.4(e)
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From: Mohandeson, Mike [mailto:Mike.Mohandeson@kingcounty.gov]
Sent: Thursday, September 30, 2021 8:49 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Subject: Opposition to proposed rule change to CrR 3.4(e)

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To whom it may concern:

I am a Senior Deputy Prosecuting Attorney for King County, where I have practiced for the past 21 years. I would urge the court to reject the proposed changes to CrR 3.4(e). Below is a non-exhaustive list of my concerns, even though remote appearances for critical stages of the proceedings such as arraignment, trial, pleas and sentencings would still require court approval:

- 1) There can be technical issues with the Zoom connection, which can interfere with ensuring that defendants can hear and observe everything that is occurring in the courtroom (especially if they have a small screen). This is even more problematic with regard to remote appearances during trial because outcomes that result in a guilty finding are more likely to be appealed than even guilty pleas and sentencings. Creating more issues for appeal due to the heightened risk of irregularities during Zoom trial appearances also increases the risk of having to re-do trials. That places an undue burden on an already overloaded court system and creates an unfair risk that victims and witnesses will have to re-testify (assuming they are willing and available to re-testify and their memories haven't faded a year or more later when the appeal is resolved). Additionally, any new trial would require an entirely new group of jurors to spend their valuable time as well.
- 2) Defendants will have a more difficult time readily communicating with their attorneys. Even if they are willing to speak up about any challenges in doing so, it will require interruptions to the Zoom trial proceedings by them having to be put into a virtual "breakout room" to speak to counsel.
- 3) Zoom trials where defendants need interpreters could be particularly challenging. This may result in inequitable treatment of non-English speaking defendants who are more likely to have to appear physically in court. Similarly, there is a risk of inequitable treatment for defendants with limited means who have less reliable internet access. If the defendant

cannot maintain a stable internet connection, he/she would likely have to be ordered to appear in court in person, which would disrupt the trial proceedings during the time it took for the defendant to make it to the courtroom. Some such defendants may also have transportation issues on such short notice, which would further delay the proceedings for that day and potentially disrupt witness scheduling.

- 4) It would be much more difficult for jurors to evaluate the defendant's credibility if he/she testifies by Zoom because only a portion of his/her body would be visible to the jurors. Non-verbal cues (i.e. body language) can be very important in this context. Defendants should be subject to the same standard of evaluation as any other witness. It would also be very difficult to regulate whether there was anyone coaching the defendant off-screen (through paper or electronic means). Defendants could also impermissibly refer to notes or other items that are not apparent during a remote appearance.
- 5) It is not fair or just that defendants are the only ones who are permitted to appear remotely, when others (including victims) must appear in person. Other witnesses may face similar hardships (or fears about) appearing in person and should be afforded the same consideration as criminal defendants. However, leveling the playing field would create certain problems, namely that attorneys for defendants would have little incentive not to object to such remote appearances by other witnesses unless they believed it was to the advantage of the defendant; thus, setting up further appellate issues if requests were granted over their objections. Indeed, defense counsel would likely argue the same considerations outlined in paragraph 4 immediately above.
- 6) **Defendants could capture images of victims, witnesses, jurors, judges, and/or the parties, which in some cases could have nefarious and dangerous implications.**

As mentioned at the outset, I recognize the court must still grant permission in any given case for a defendant to appear remotely. But, making this extraordinary change will invariably result in an unpredictable and potentially inequitable distribution of such requests being granted across the state, or even within the same jurisdiction. This can have a disparate impact on not only defendants, but the victims and witnesses who are an integral part of any trial. By their very nature, certain types of hearings (trials in particular) require the defendant's physical presence.

Best Regards,

Michael Mohandeson