From: OFFICE RECEPTIONIST, CLERK
To: Linford, Tera
Subject: FW: Proposed Amendment to CrR 3.4
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From: O'Toole, Scott [mailto:Scott.Otoole@kingcounty.gov]
Sent: Thursday, September 30, 2021 1:13 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Subject: Proposed Amendment to CrR 3.4

I write to oppose the proposed amendment to CrR 3.4 that would permit defendants to participate remotely in virtually all criminal proceedings. I have no doubt that the obvious practical and logistical issues – e.g. access to clear and secure video and audio feeds during the trial and for purposes of the record for any potential appeal – have been catalogued by others, as has the reality of the potential for misuse and the negative impact on witnesses, victims and survivors. All of those objections and considerations have merit.

I write to ask the Court to reject the proposed amendment to CrR 3.4 for reasons that are based not on the practical limitations and shortcomings of permitting defendants to appear remotely, but because of the real impact of in-person involvement on the defendant and all others involved in criminal prosecutions. That impact is real.

All members of the criminal bar are well acquainted with Crawford v. Washington, 541 U.S. 36 (2004), and its reaffirmation of the principles underlying the Confrontation Clause. Frankly, as a prosecutor for more than 30 years, Crawford made the my job more difficult in requiring in-person confrontation where previously testimony was admissible if it bore "adequate 'indicia of reliability.'" Nevertheless, Crawford was the correct decision. As anyone who has tried cases knows, the physical, in-court presence of the participants (defendants, witnesses, even jurors) changes the dynamic of what occurs at trial. "Reliability is an amorphous, if not entirely subjective, concept." Id. at 63. Like much of what is viewed on television, that which is viewed remotely on a monitor is not "real" or palpable, especially to jurors who are viewing the alleged crime through the testimony and experience of others. Requiring the physical presence of the participants at trial changes the dynamics of the trial. Requiring face-to-face observation unfiltered through a screen, no matter how high the definition or quality of the image, impacts the proceedings.

Finally, I would urge the Court to not adopt such a significant change in the criminal rules based

upon considerations such as “fewer required physical appearances for defendants would likely lead to fewer missed court dates and warrants. This reduction should decrease daily court congestion and allow for a more expeditious case resolution while improving access to justice.” The effect of permitting defendants to “opt out” of the proceedings, especially trials, would cheapen the process and make it less reliable. Further, insulating defendants from the responsibility for attending their own criminal proceedings sends a message that demeans the process and insults those, including defendants, with the greatest stake in the proceedings. Finally, certainly we have not come to the point where “decreas[ing] daily court congestion and allow[ing] for a more expeditious case resolution” has become the primary goal of criminal prosecutions? Justice is not always expeditious, nor should it be. Justice is not a function of cost-benefit analysis. Justice, even if slow, should be sure.

Thank you for taking the time to consider my comments.

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