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**Subject:** FW: Opposition to proposed changes to CrR 3.4  
**Date:** Thursday, September 30, 2021 4:49:38 PM

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**From:** Guthrie, Stephanie [mailto:Stephanie.Guthrie@kingcounty.gov]  
**Sent:** Thursday, September 30, 2021 4:18 PM  
**To:** OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>  
**Subject:** Opposition to proposed changes to CrR 3.4

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To Whom It May Concern:

I am writing to express my strong opposition to the proposed changes to CrR 3.4. These changes go far beyond codifying existing practices during the Covid-19 pandemic, and will create a host of potential problems relating to technical failures, voluntariness of waivers of constitutional rights, voluntariness of pleas, and even the identity of the person who appeared (particularly by phone). The changes give accommodations and conveniences to defendants that are not afforded to victims and witnesses in a way that will undercut the confidence of victims, witnesses, and the public in the fairness of the criminal justice system. As a whole, the changes will disproportionately benefit wealthier defendants and disproportionately disadvantage poor and non-English-speaking defendants. Additionally, as an appellate lawyer, it is easily foreseeable that the changes will create a boom in appeals and the reversal of convictions when defendants' remote appearances inevitably result in irregularities and unforeseen circumstances in which defendants will be able to validly assert that the scope of their waiver of certain constitutional rights was exceeded by the unexpected circumstance.

1. It would be an outrage to have a system where a defendant can choose to be tried from a beach in Cancun, and yet the 12-year-old he raped has to take the stand in person, or the terrified stranger he robbed at gunpoint, or the significant other he beat and coerced and controlled for years. Convincing reluctant victims to come testify is one of the hardest parts of a prosecutor's job in units like domestic violence, sexual assault, and gangs. Testifying at trial is often a highly re-traumatizing experience for victims—I am reminded of the day about ten years ago where I spent my afternoon watching out the window of a building near the courthouse as a former child rape victim considered jumping off the roof of the courthouse rather than be cross-examined by her pro se abuser. Can you imagine having to tell a traumatized and terrified victim that they have to appear in person and be questioned by the defense attorney in person, but the defendant gets to testify from the comfort of his

home? A defendant could choose to be present on the day his victim testifies in order to intimidate her, and yet choose to appear remotely from the comfort of his home on the day he testifies. If a defendant chooses to appear remotely, he should have to also waive his right to have victims and witnesses appear in person. And yet, I doubt that such a system would be viable because defendants would claim their waiver was coerced.

2. If a defendant appears for plea remotely, his signature will not appear on the plea form. There will be no way to verify later that the person who entered the plea was actually the defendant unless the proceedings are video recorded. I doubt any county, let alone the small ones, are prepared to start video recording every single proceeding and store all that video.
3. If a defendant appears remotely for trial, there is no way to remand him upon conviction. He can just wait to see what the verdict is, and then if he doesn't like it he can flee. A defendant could appear for trial from a whole other country, without any intention of returning to be sentenced if he doesn't like the result.
4. We normally prove that prior convictions belong to defendants through their fingerprints on the J&S. If the defendant is not present for sentencing, he cannot be fingerprinted. If he isn't going to DOC, we may never be able to prove in the future that the conviction belongs to him. This is unacceptable. A similar problem will arise with in-court identifications at trial.
5. There will be no way to serve a remote defendant with a no-contact order at sentencing. In domestic violence and stalking cases in particular, immediately and indisputable service is critical to protecting victims and allowing successful prosecution of defendants who knowingly violate the orders. If a defendant is remote, the only way to ensure he has actual knowledge of the whole document would be to take the time to read every single word of it to him on the record. And the only way to later prove that it was served on the correct person, in the absence of a signature, would be to videorecord the proceeding and preserve the recording forever. As noted above, courts are not equipped to do this currently.
6. The rules don't just allow video appearance, they allow telephonic appearance! How could we ever prove in a later proceeding that it was the defendant who was on the other end of the phone?
7. Defendants will be responsible for their own device and internet access—this allows defendants of more means to appear remotely, but will bar defendants who lack the financial means to afford a computer/smart phone and who lack reliable internet access from doing the same. It will be the poor defendants, who are disproportionately defendants of color, who will have to continue appearing in person. Meanwhile, rich (disproportionately white) defendants will be able to go through their entire case from a beach in the Caribbean.
8. Defendants who need interpreters will have a much harder time understanding the proceedings remotely, where they cannot confer with their attorney using the interpreter without stopping the entire proceeding.
9. **The changes will degrade a defendant's opportunity to observe, understand, and participate in court proceedings:**
  - a. Remote participation often makes it difficult to comprehend both the words spoken and meaning conveyed nonverbally. This may make it difficult to understand the judge and the full meaning of witnesses' testimony.

- b. Courtroom presence assures that defendants focus on proceedings.
  - c. There are always technical problems: screen freeze, loss of wi-fi, with a small screen the defendant will not be able to see exhibits or a witness's or judge's face. Unexpected off-screen distractions are common.
10. Defendants may be tempted to appear remotely because it seems easy but will not understand how much of the proceedings they will not fully experience and may not understand. They cannot anticipate technical challenges or distractions that will arise. This will give rise to appeals challenging the validity of any waivers of the right to be present.
  11. Inevitably, something will happen in the courtroom that the remote defendant cannot see or hear, and it may not be apparent to the court or counsel that the defendant cannot see or hear a particular comment, document, or event in the courtroom. A defendant may not alert the court or his attorney to this fact at the time so that it can be corrected. This will lead to a lot of appellate litigation about whether what happened in the courtroom exceeded the scope of the defendant's waiver of his right to be present in person, what exactly the defendant could or could not see/hear, and whether the conviction or plea can stand. And even if the defendant can see and hear everything, there will be nothing to prevent defendants from later *claiming* that they could not see or hear something, that their sound cut out, etc, and seeking reversal of their conviction on the basis. This Court should not discount the amount of appellate litigation these changes will generate, and the number of convictions that will be overturned and remanded for retrial. With our judicial system so overwhelmed right now, rule changes that generate additional litigation and retrials is the last thing we need.
  12. At any testimonial hearing, remote participation will create problems with sharing documents and exhibits. It will be virtually impossible to assure that the defendant has the same access to exhibits, pre- and post-admission, as if present in court.
  13. The amendments diminish the right to counsel—the defendant will not have the opportunity to simultaneously consult with counsel during the proceedings. If the court has to halt proceedings for a private conversation, it may be to the defendant's or the State's detriment. Interruptions to consult with counsel also will irritate the jury and delay the proceedings. As a result, remote defendants will be reluctant to (or unable to) consult with counsel to the extent physical presence allows.
  14. As to testimony, the defendant's remote presence would not satisfy the confrontation clause. It will be difficult to assure that courts obtain sufficient waivers before allowing remote presence.
  15. It will be impossible to assure the voluntariness of a guilty plea or waiver of other constitutional rights, especially via phone, where there is no ability to determine who else is present (off screen) when the plea is taken, who may be exerting undue influence.
  16. The defendant appearing remotely for trials, guilty pleas, and sentencing diminishes the seriousness, importance, and dignity of these proceedings – that is important to all parties and to the public perception of fair administration of justice.

17. The amendment's limiting requirement of court approval for remote appearance at trial, pleas, and sentencing will require litigation of the issues noted here in each case where the possibility is raised. This will cause further waste of time or will be perfunctory consideration that does not explore the overwhelming negative consequences of remote appearances at these proceedings.

There are other problems with the proposed changes, but hopefully this is enough to convince the court that the proposed changes should be rejected.

Sincerely,

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