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From: Heather Stone [mailto:heather.stone@co.thurston.wa.us]
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Subject: Comments for Proposed GR 41

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We strongly object to the proposed GR41 rule of virtual voir dire based on practical experience here.

- Virtual voir dire is unnecessary and not an improvement over status quo. Public health and safety measures can co-exist with in person voir dire; the two are not mutually exclusive or incompatible.
- Other hearings that occur virtually can be addressed differently than voir dire when problems occur and have different implications.
 - o In other hearings, if there is an issue with connectivity, then the parties can agree to set it over or resume at a later date/time and, generally, that impacts approximate 5-6 people (2 x attys, 1 x judge, 1 x defendant, 1 x clerk, and possibly 1 x court reporter). A significantly greater number of people are required to make the hearing go smoothly in virtual voir dire and are inconvenienced when it does not. A hearing impacting 5-6 people should not be used to determine the impact of a hearing on an avg of 30 people.
 - o Voir dire is different in timing. In virtual voir dire there is a constant rush from the court to get it done and get it done quickly because there are multiple panels of jurors to get through and only so much time to do it in. The process *does not* move more quickly on line than in person. In the event voir dire needs to be paused or continued, the entire venire is impacted and requiring folks to wait while someone drives to the courthouse or gets their connectivity back is not more efficient.
 - o The whole process is wholly unlike any other hearing and should be treated as

such.

- Voir dire initiates the beginning of trial proceedings, the most serious and formal portion of our criminal justice system. To date, virtual COVID court proceedings have repeatedly shown us that appearing virtually does not carry the same formality or decorum as one would have if they were appearing live in court, in front of robed judge and attorneys at the bar. Instead, parties appear in their vehicles, with their children, their pets, and housemates. They continue to work, read emails, answer phone calls, answer doors, lie in bed, wear pajamas, wear sports jerseys, wear no shirts, smoke, drive, etc. While no malicious intent or ill will is taken by the parties from those events and appearances, what is clear is that the formality and gravity of the proceedings, especially for the defendant, has been abridged. While it may not be dispositive of the situation, certainly it is a concern for the parties and is an indication of how serious the jurors, and people in general, take their duty when appearing virtually. Appearing in person gives a layer of formality to criminal trial proceedings that such deserves and that does not exist when such appearances are occurring from the parties' and Court's homes and offices. While the latter scenario may be acceptable for the purpose of a pretrial or omnibus hearing, a criminal trial should be approached with a much different mindset and should be reflected appropriately by all parties, the court, and the defendant in the proceedings themselves.
- The proposed rule indicates that the proceedings can be open to the public. This seems to indicate to the State that some streaming service such as Youtube would be involved or approved by such a rule. The parties have deep seated concerns with the chilling nature of potential jurors' answers due to Youtube streaming.
- Things observed during both our practice virtual voir dire using friends of the court (for practice voir dire) as well as community members for a criminal trial:
 - o The parties could only see a portion of one juror's head for a majority of the time.
 - o A juror was doing it his from a car (appeared have just arrived at home) and was obviously talking to someone in the car with him.
 - o A juror was on the computer obviously doing/reading something else.
 - o Another juror also appeared in her car briefly.
 - o Multiple jurors appeared to be reading from something below their screens, likely a phone. When asked, neither juror admitted it, even though you could see the reflection in one of the juror's glasses of whatever she was reviewing.
 - o Jurors had multiple monitors up, so it was clear we were on one monitor and other items were on other monitors. You could see jurors eyes patently moving back and forth reading things on the screens. Since there was nothing to read on our screen it was obvious that they had other items up they were reviewing.
 - o It felt rushed by the court, like speed dating so it was hard to build a rapport with the jurors and get them to engage with each other.
 - o One juror appeared to be answering her email.

- Another juror froze entirely and we couldn't see his reactions. He missed out on large swaths of the voir dire and ultimately was dismissed for cause because of it, even though he was willing to participate as a juror. Also, because he froze, you could only see his chin for a large portion of the questioning so the parties were unable to gauge his reactions to answers and questions.
- Some people's video feeds cut out altogether and then they came back in to the voir dire, so we have no idea what they actually missed.
- One juror got up and started walking around their house (after they got out of their car, left the feed entirely, and then came back into the in-session voir dire). Then he continued to chat with people in the background and get up to hug people, so he was clearly not engaged or taking this with any real level of gravity and formality. He was also excused for cause.
- Despite repeated instructions and reminders from the court not to do anything with cell phones or read other things, multiple jurors continued to obviously do so. The court reminded people on at least three separate occasions to stop using their phones.
- In our "practice" voir dire, jurors were in bed on their phones, in their pajamas, left to go answer the door for packages, etc.
- Several jurors admitted at the end that they continued to work during the practice voir dire.
- All participants could not in fact see and hear each other at all times. Delays in network quality prevented the participants from seeing and hearing both the court, other jurors, and the attorneys. Moreover, the court and parties weren't aware of the delays occurring due to network quality until after the issue had passed. The juror was unable to interrupt to notify the parties of the issues and ask for something to be repeated or for accommodations to be made.
- We are using multiple panels of 20-24 venire jurors at a time in court which our space accommodates. In contrast, the court here decided that 6 jurors at most was allowed per screen via Zoom so that all facial features and background environments would be clear to the parties, meaning that the latter panels would not be privy to the former panels' questions and answer. However, increasing the Zoom panel size to much more than 6 (while still accounting for the presence of the parties and the court on screen) significantly decreases the parties' and court's ability to observe the potential juror's facial and body language, and what was occurring in their environment. This would not be an issue with in person voir dire.
- Jurors do not follow these rules and have to be told multiple times to comply which does not happen in in-court jury proceedings. When jurors are at home, the court cannot control their behaviors. When they are in court they are a captive audience who do not even have access to their phones. The act of them being on a computer provides them with an inherent distraction and an inability for the court to control their attention and behaviors. While jurors are presumed to follow the instructions

given, our experience has been that they are not yet invested in the case in front of them and their involvement and apparent desire to follow the rules is significantly lessened.

- Ultimately, the idea of providing an alternative method for virtual participation fails in practicality. If a person does not know they have internet or signal issues until they begin the venire or such technology issues start part way through voir dire, then the court must either excuse them solely based on that issue, or recess the voir dire in order for that individual to come to the courthouse to get set up. In the event the juror cannot come to the courthouse due to child care or other logistic issues (because they had planned to be present at home throughout selection), then the juror must also be excused unexpectedly and based solely on their inability to access the internet which is improper. There is simply no alternate method that allows for the court to respond accordingly and timely to a virtual issue that doesn't otherwise result in a significant delay of proceedings or result in improper juror excusal.
- The proposed rule is inadequate to guide lower courts in a manner that is both functional and effectively protects the rights of the parties. Lower court judges often seem less concerned about the impact of being appealed and overturned by their higher courts, presumably because the first level of review is the local Superior Court. Practically speaking, district judge errors are rarely seen statewide by their peers in the same way that a Superior Court judge's may be. As a result, it seems greater liberties are taken with trial procedure. Allowing courts to create their own procedures almost confirms that due process procedures across the state will differ wildly between jurisdictions, not to mention between courts within a single jurisdiction. This should not be so.
- The parties do not want virtual voir dire and have lobbied hard against it here. If the parties BOTH agree to it at an individual trial, then the argument may be different on that day at that time for those parties, but where *any* party objects it certainly should not occur over their objections.