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Supreme Court No. 101128-8  
(COA No. 55841-6-II)

THE SUPREME COURT OF THE STATE OF  
WASHINGTON

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STATE OF WASHINGTON,  
Respondent,

v.

EARNEST ALAN BLACK,

Petitioner.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR LEWIS COUNTY

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PETITION FOR REVIEW

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## A. IDENTITY OF PETITIONER

Earnest Black, petitioner here and appellant below, asks this Court to accept review of the Court of Appeals decision terminating review designated in Part B of this petition pursuant to RAP 13.4.

## B. COURT OF APPEALS DECISION

Mr. Black seeks review of the Court of Appeals decision dated May 24, 2022, and reconsideration denied dated July 13, 2022, a copy of which is attached as Appendix A.

## C. ISSUES PRESENTED FOR REVIEW

1. Due process requires the State to properly and adequately inform criminal defendants of pending criminal charges in superior court. Does the Court of Appeals incorrectly hold that the government bears no responsibility to look for and bring criminal defendants before the superior court to answer pending charges?

2. Due process requires the State to properly and adequately inform criminal defendants of pending criminal charges. Does the Court of Appeals incorrectly hold there is no issue of preaccusatorial delay once criminal charges are filed?

3. The United States and Washington State Constitutions require criminal defendants to be represented by licensed counsel at all critical stages. When charges are filed in juvenile court and an initial arraignment hearing is conducted, is that initial hearing a critical stage for purposes of the sixth amendment and article 1, section 22, requiring counsel be appointed to protect the juvenile's constitutional and statutory rights?

#### D. STATEMENT OF THE CASE

Earnest Black was in custody at Green Hill School, a juvenile detention facility when he engaged in a physical altercation with a staff member. The incident took place on April 28, 2020. CP 18.

On June 2, 2020, Mr. Black was released from Green Hill. Immediately following Mr. Black's release, Snohomish County arrested Mr. Black on an outstanding warrant for unrelated charges for an incident in Snohomish County. RP 4.

On June 11, 2020, the prosecutor's office emailed Green Hill to determine if Mr. Black was in custody or had been released. Green Hill confirmed Mr. Black was released from custody. There was no other information given. CP 18, 27.

On June 15, 2020, the prosecutor's office filed charges in juvenile court in Lewis County. CP 22-3. Notice of charges in Lewis County was sent to two different addresses appearing to be associated with Mr. Black. *Id.* But, there is no evidence in the record what type of connection Mr. Black had with those addresses except they were his parent's addresses. No notice was sent to Snohomish County jail. CP 24.

When charges were filed in juvenile court, Mr. Black had approximately four months until his 18th birthday.

On August 4, 2020, an initial hearing was held in Lewis County Juvenile Court. Mr. Black did not appear and a bench warrant was issued. The record does not establish Mr. Black was represented by counsel at the initial hearing.

On October 6, 2020, Mr. Black turned 18 years old. The prosecutor's office dismissed the juvenile charges and re-filed in superior court on October 19, 2020. CP 1-2.

The Superior Court entered an order appointing Mr. Donald Blair as defense counsel. Mr. Blair, soon after, filed a motion to dismiss for preaccusatorial delay. The court heard the matter on March 17, 2021.

Mr. Blair argued that the prosecutor's office failed to properly notify Mr. Black and that a quick search of its system would have revealed Mr. Black was in custody in Snohomish County, and had Mr. Black been properly notified he would have been transported for his initial



arraignment in juvenile court. The trial court denied Mr. Black's motion to dismiss for preaccusatorial delay as well as the argument the State bore responsibility to transport Mr. Black from Snohomish County. The court noted that there was no evidence the State did anything wrong.

Mr. Black pled guilty as an adult and was sentenced to a standard range.

On appeal, Mr. Black raised two interconnected issues: first, that due to pre-accusatorial delay based on the State's negligent conduct for failing to properly bring Mr. Black before the juvenile court caused the loss of juvenile jurisdiction. Second, in the alternative, Mr. Black's conviction should be vacated under CrR 8.3(b) due to the State's misconduct for failing to properly bring Mr. Black before the juvenile court.

Division Two disagreed with both arguments. First, the Court determined that there was no pre-accusatorial delay because charges were filed without meaningful

delay. OP at 4. Further, the Court was unpersuaded “the State’s failure to look for, and locate, Black in another county after his release from custody in Lewis County was intentional or negligent for purpose of establishing a pre-accusatorial delay.” OP at 4. And the Court noted there is no authority that places the burden on the State to look and/or locate the defendant in another county and that neither the federal or state constitution require special efforts when dealing with juvenile defendants. OP at 4-5.

Second, the Court declined to address Mr. Black’s second argument, dismissal was warranted under CrR 8.3, holding that this Court in *Warner*, held it cannot be raised for the first time on appeal. OP at 5-6.

Division Two affirmed and denied Mr. Black’s motion for reconsideration. This timely petition follows.

## E. ARGUMENT

### 1. THE COURT OF APPEALS INTERPRETATION OF PREACCUSATORIAL DELAY IS TOO NARROW.

The trial court denied Mr. Black's motion to dismiss on grounds of preaccusatorial delay finding that the State did not delay filing charges and there was no evidence the State could have brought Mr. Black before the juvenile court, or that there is any burden on the State to do so. The Court of Appeals held there was no preaccusatorial delay because the State filed charges without meaningful delay and because the government is not required to employ special services to bring juvenile defendants before the court.

The Court of Appeals erred in both regards: first, the Court's interpretation is too narrow in that, the issue of preaccusatorial delay cannot be prevented by simply filing charges. Due process must require some evidence the defendant was actually informed of the pending charges.

Here, there was nothing in the record that Mr. Black was properly informed.

Second, the Court erred because several published opinions recognize the government bears some burden to bring the defendant before the superior court once charges have been filed. *State v. Anderson*, 102 Wn. App. 405, 9 P.3d 840 (2000); *State v. Wirth*, 39 Wn. App. 550, 694 P.2d 1113 (1985).

Dismissal for preaccusatorial delay is required when the State's intentional or negligent delay violates the defendant's due process rights. *State v. Maynard*, 183 Wn.2d 253, 264, 351 P.3d 159 (2015). Washington Courts apply a three-pronged test to determine if preaccusatorial delay violated the defendant's due process rights: "(1) the defendant must show he or she was actually prejudiced by the delay; (2) if the defendant shows actual prejudice, the court must determine the reasons for the delay; and (3) the court must weigh the reasons for delay and the prejudice

to determine whether fundamental conceptions of justice would be violated by allowing the prosecution.” *Id.* This is not a bright line test but an analytical framework “to assist a court in determining whether a delay violates fundamental conceptions of justice...” *State v. Oppelt*, 172 Wn.2d 285, 289-90, 257 P.3d 653 (2011).

Juveniles have a statutory right to be tried as a juvenile and that statutory scheme provides immense benefits to juveniles such as avoiding the stigma of an adult criminal conviction, reduced penalties, and the possibility of maintaining a sealed juvenile record. *Maynard*, 183 Wn.2d at 259 (citing *State v. Dixon*, 114 Wn.2d 857, 860-63, 792 P.2d 137 (1990); RCW 13.04.030(1); RCW 13.50.260.

Division Two, in Mr. Black’s case, asserts there cannot be preaccusatorial delay once charges have filed unless there was a meaningful delay. This assertion fails to consider the facts of the case and the duties and

responsibilities imposed on each party, especially in the juvenile context. For example, in *Maynard*, this Court highlighted the importance and significance of juvenile jurisdiction when it held counsel's failure to adequately examine and identify the defendant impending 18th birthday was constitutionally deficient assistance of counsel that was prejudicial that required reversal. *Maynard*, 183 Wn.2d at 261-63.

Division Two's opinion also fails to consider the burden placed on the State to act on readily available information. For example, in *Wirth*, a speedy trial issue case, the government failed to adequately act on information readily available to them to properly notify the defendant of pending charges. *Wirth*, 39 Wn. App. at 553.

The Court stated

Where law enforcement officials have information which could lead readily to the person sought through standard follow-up inquires, those leads must be pursued. To allow otherwise would permit officers to close

their eyes and ears to information openly available, harming both the rights of those accused and the public interest in prompt, thorough police work.

*Id.*

And lastly, Division Two's assertion fails to recognize this Court's opinion in *Dixon* where it, inter alia, held prosecutor's enjoy wide discretion when determining to file charges stating they can delay "until they are completely satisfied that they should prosecute and will be able to promptly [] establish guilt beyond a reasonable doubt." *Dixon*, 114 Wn.2d 857, 792 P.2d 137 (1990) (quoting *State v. Lidge*, 111 Wn.2d at 850, 765 P.2d 1292 (1989)). Without a defendant, and properly and adequately notifying the defendant, the prosecutor cannot promptly establish guilt beyond a reasonable doubt.

These three opinions demonstrate that each party has on-going duties and responsibilities prior to and after filing criminal charges. In Mr. Black's case, charges were

filed when he was 17 years old. The State had access to information indicating Mr. Black had outstanding warrants and was in custody in Snohomish County Jail, yet inexplicably failed to inform Mr. Black. Moreover, due to Mr. Black's incarceration status, there is no way for Mr. Black to know he had pending charges and take steps to protect his statutory and constitutional rights. Accepting Division Two's narrow interpretation, that preaccusatorial delay is not implicated once charges are filed, will result, as it did here, in countless future juvenile defendants being denied benefits of juvenile jurisdiction.

What is apparent in this case is the crack Mr. Black fell through. He committed a crime but was never properly informed. The State has unfettered access to interagency government resources, yet in this case Mr. Black's location could not be discovered with a quick search. In fact, Mr. Black was in the same location, at Snohomish County jail, when charges were filed in Lewis County juvenile court,



dismissed, and refiled in Lewis County superior court. Division Two's opinion does not address this issue.

Lastly, Division Two's opinion leaves unresolved what issue can be raised in this unique but foreseeable fact pattern. As Division Two correctly recognized, there was no meaningful delay in filing charges, in both juvenile and superior court. This all but precludes the ability raise constitutional speedy trial issues. See *State v. Ross*, 8 Wn. App. 2d 928, 958, 441 P.3d 1254 (2019) (balancing the *Barker* speedy trial factors involving extradition and a 38 day delay in filing charges). Further, once charges were filed, and Mr. Black was brought before the court, there was no apparent violations under CrR 3.3. Therefore, within these bounds, preaccusatorial delay necessarily incorporates the notion that due process is not satisfied until the juvenile defendant is made aware of the pending charges. In Mr. Black's case, without some way to challenge the inaction by the parties, Mr. Black is without recourse.

This Court should accept review to determine if due process requires the defendant to be made aware of the pending charges against her/him and if so, whether preaccusatorial delay is implicated when the defendant is not properly notified.

2. A JUVENILE'S INITIAL ARRAIGNMENT IS A CRITICAL STAGE IN WHICH COUNSEL MUST BE APPOINTED.

Juveniles, absent a few exceptions, are afforded the same due process protections as adults. *State v. Poupart*, 54 Wn. App. 440, 445, 773 P.2d 893 (1989); RCW 13.440.200(2); U.S. Const. amend. XI; article 1, section 22. This includes representation by counsel at all critical stages unless properly waived. *State v. M.N.H.*, 199 Wn.2d 337, 505 P.3d 548 (2022) (citing RCW 13.40.140). In the Constitutional context, "A 'critical stage' in the right to counsel context is when a 'defendant's right may be lost, defenses waived, privileges claimed or waived, or in which the outcome of the case is otherwise substantially

affected.” *State v. Heddrick*, 166 Wn.2d 898, 910, 215 P.3d 201 (2009).

Here, the initial arraignment, in which a bench warrant was issued, and every subsequent pre-trial hearing up to when juvenile charges were dismissed, were critical stages. If Mr. Black was at the initial hearing, the juvenile court would have been required to appoint counsel. And, had defense counsel been appointed at the juvenile court stage, not only would Mr. Black had juvenile jurisdiction extended, had counsel failed to extend jurisdiction, Mr. Black would have had his adult conviction vacated and juvenile jurisdiction reinstated on appeal.

However, Mr. Black was not appointed counsel until adult charges were filed and Mr. Black was in actual attendance at a pre-trial hearing. In this instance, Mr. Black did not constitutionally waive his right to counsel.

Mr. Black did not raise this issue at the Court of Appeals as an alternative argument. But the Court of

Appeals decision now highlights the gap of when the right to counsel attaches and when counsel is actually appointed. Accepting the Court of Appeals decision that the State bears no responsibility to properly inform and bring juvenile defendants before the court to answer pending charges, thereby causing the loss of juvenile jurisdiction, juveniles are left vulnerable and their right to juvenile jurisdiction in jeopardy.

If this Court declines to address the issue of preaccusatorial delay, Mr. Black respectfully request this Court accept review under RAP 13.4 to determine whether juvenile's should be appointed counsel, regardless of their presence, to ensure their rights and minimally protected

This Court has discretionary authority to review claims raised for the first time on appeal. *M.N.H.*, 199 Wn.2d at 339-40 (citing *State v. Blazina*, 182 Wn.2d 827, 834-35, 344 P.3d 680 (2015)); RAP 2.5(a). This discretionary authority includes addressing issues not

raised by the parties or Court of Appeals, at the first appellate level. See *State v. Molnar*, 198 Wn.2d 500, 511-12, 497 P.3d 858 (2021) (Court addressed issue raised by amici and in oral argument).

#### F. CONCLUSION

Based on the foregoing, petitioner XXX respectfully requests that review be granted pursuant to RAP 13.4 (b).

DATED this 28th day of July, 2022.

I, Kyle Berti, in accordance with RAP 18.7, certify that this document is properly formatted and contains 2429 words.

Respectfully submitted,



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Attorney for Petitioner

I, Kyle Berti, a person over the age of 18 years of age, served the Lewis County Prosecutor ([appeals@lewiscountywa.gov](mailto:appeals@lewiscountywa.gov); [sara.beigh@lewiscountywa.gov](mailto:sara.beigh@lewiscountywa.gov)), and Earnest Black a true copy of the document to which this certificate is affixed on 7/28/2022. Service was made by electronically to the prosecutor, and Mr. Black by depositing in the mails of the United States of America, properly stamped and addressed.



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KYLE BERTI  
WSBA No. 57155  
Attorney for Petitioner

# APPENDIX

May 24, 2022

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

**DIVISION II**

STATE OF WASHINGTON,

Respondent,

v.

EARNEST ALAN BLACK,

Appellant.

No. 55841-6-II

UNPUBLISHED OPINION

PRICE, J. — Earnest A. Black appeals his conviction for custodial assault arguing that the superior court erred by denying his motion to dismiss based on preaccusatorial delay resulting in loss of juvenile court jurisdiction. We affirm the superior court.

**FACTS**

On April 28, 2020, Black kicked a staff member of the Green Hill School, a juvenile detention facility, in the knee. The State charged Black with custodial assault and harassment in Lewis County juvenile court in June 2020, approximately four months before Black turned 18 years old. When the charges were filed, the State confirmed with Green Hill that Black had been released to the community on June 2. Notice of the charges was sent to Black at two different addresses. Notice was also sent to Black's parents at their individual addresses. However, Black was taken into custody in Snohomish County shortly after his release from Green Hill, and he failed to appear in Lewis County juvenile court.



After Black turned 18, the State refiled the Lewis County charges in superior court. Black filed a motion to dismiss based on charges being delayed until after Black turned 18 and the juvenile court losing jurisdiction. At the hearing on the motion to dismiss, Black admitted that the State had charged him as a juvenile, but argued that the charges should still be dismissed because the State failed to transfer him from custody in Snohomish County prior to his eighteenth birthday. The State argued that Black's motion was based solely on preaccusatorial delay. Because the State did charge Black as a juvenile, it argued that Black's motion should be denied.

Also considering the motion as being based on preaccusatorial delay, the superior court denied Black's motion to dismiss because the State filed charges in juvenile court and did not delay charging Black until he was an adult. Further, the superior court stated that it would deny Black's motion even if it considered his alternative argument that the State should have transferred Black from Snohomish County. The superior court noted that there was no evidence that the State actually knew that Black was in custody in Snohomish County or evidence that Black could have been transferred to Lewis County. The superior court explicitly stated there was no evidence that the State did anything wrong in this case. The superior court entered a written order stating only that Black's motion to dismiss was denied.

Black pleaded guilty to custodial assault. The charge of harassment was dismissed. The superior court sentenced Black to a standard range sentence of six months.

Black appeals.

## ANALYSIS

Black argues that the superior court erred by denying his motion to dismiss because preaccusatorial delay violated his right to due process and because the State's mismanagement of the case requires dismissal under CrR 8.3(b). We disagree.

### I. PREACCUSATORIAL DELAY

A claim of preaccusatorial delay arises when a delay in filing charges results in a violation of a defendant's due process rights. *See State v. Oppelt*, 172 Wn.2d 285, 257 P.3d 653 (2011) (addressing claim of preaccusatorial delay based on failure to file charges for six years); *State v. Warner*, 125 Wn.2d 876, 890, 889 P.2d 479 (1995) (addressing claim of preaccusatorial delay based on failure to file charges until after defendant turned 18); *State v. Dixon*, 114 Wn.2d 857, 792 P.2d 137 (1990) (addressing claim of preaccusatorial delay based on delay in filing charges until after co-defendant was tried). We review whether preaccusatorial delay violates a defendant's right to due process de novo. *State v. Maynard*, 183 Wn.2d 253, 259, 351 P.3d 159 (2015).

To determine if preaccusatorial delay violated a defendant's due process rights, we apply a three-pronged test: (1) the defendant must show he or she was actually prejudiced by the delay; (2) if the defendant shows actual prejudice, the court must determine the reasons for the delay; and (3) the court must weigh the reasons for delay and the prejudice to determine whether fundamental conceptions of justice would be violated by allowing the prosecution.

*Id.* at 259.

Although there is no constitutional right to be tried in juvenile court, being tried in juvenile court has statutory benefits. *Id.* at 259-60. Therefore, "a defendant meets his or her burden to

show actual prejudice when the preaccusatorial delay *causes* the loss of juvenile jurisdiction.” *Id.* at 260.

“[A]n intentional delay by the State to circumvent the juvenile justice system will violate due process.” *Warner*, 125 Wn.2d at 890. In contrast, “a negligent delay *may* violate due process.” *Id.* at 891. “Neither the due process clause nor Washington statute requires that police or prosecutors employ special procedures for dealing with a juvenile suspect who is approaching his 18th birthday.” *Id.* at 891.

Black argues that the State’s delay in locating him and bringing him before the juvenile court resulted in prejudice by causing the loss of juvenile court jurisdiction. However, it is undisputed that the State charged Black in juvenile court. And Black does not argue that there was any meaningful delay prior to filing those juvenile charges. Black only argues that the State was negligent in not locating him in-custody in another county. In this case, there was no *preaccusatorial* delay that resulted in loss of juvenile court jurisdiction because the State promptly filed the charges in the juvenile court.

Furthermore, we are not persuaded that the State’s failure to look for, and locate, Black in another county after his release from custody in Lewis County was intentional or negligent for the purpose of establishing a preaccusatorial delay. Legally, Black has cited to no authority that places this duty on the State. *See DeHeer v. Seattle Post-Intelligencer*, 60 Wn.2d 122, 126, 372 P.2d 193 (1962) (“Where no authorities are cited in support of a proposition, the court is not required to search out authorities, but may assume that counsel, after diligent search, has found none.”).

Black asserts that “there is no indication the State took any additional efforts after Mr. Black missed the initial hearing and for several months after the initial hearing.” Appellant’s

Opening Br. at 16. But “[n]either the due process clause nor Washington statute requires that police or prosecutors employ special procedures for dealing with a juvenile suspect who is approaching his 18th birthday.” *Warner*, 125 Wn.2d at 891. Because Black cannot establish that the State had any obligation to locate him and ensure he appeared in juvenile court, Black cannot establish that the State’s actions resulted in any intentional or negligent delay. Because there was no intentional or negligent preaccusatorial delay that caused the loss of juvenile court jurisdiction, we do not need to reach the issue of whether preaccusatorial delay violated Black’s right to due process.

## II. DISMISSAL UNDER CrR 8.3(b)

Black also argues that the State’s failure to locate Black before he turned 18 and the juvenile court lost jurisdiction was misconduct, requiring dismissal under CrR 8.3(b). The State argues that we should decline to consider Black’s argument because the superior court did not base its decision on CrR 8.3(b). We agree with the State and decline to consider Black’s argument regarding CrR 8.3(b).

In *Warner*, our supreme court determined that it is not appropriate to review an argument based on CrR 8.3(b) if the record demonstrates the superior court’s decision was not based on CrR 8.3(b). 125 Wn.2d at 883. Because the record demonstrated that the superior court did not base its decision regarding dismissal on CrR 8.3(b), our supreme court declined to apply the standards or review appropriate for CrR 8.3(b) motions. *Warner*, 125 Wn.2d at 882-83. Our Supreme Court explained:

The record shows that the trial court did not base its dismissal of the charges on CrR 8.3(b). The rule states any exercise of discretion under the rule “shall” be accompanied by a written order setting out the court’s reasons. There was a written

order of dismissal in this case, but it did not set out any reasons, nor did it mention CrR 8.3(b). Similarly, the trial court's oral opinion did not mention CrR 8.3(b) and did not indicate in any way that the dismissal was based upon this rule.

*Warner*, 125 Wn.2d at 882 (footnote omitted).

Similarly, here, the record shows that the superior court did not, in any way, base its decision on CrR 8.3(b). The superior court's written order did not mention CrR 8.3(b) or set out any reason for the dismissal. Further, although the superior court did consider Black's alternative argument—that the delay in bringing Black before the juvenile court rather than the delay in filing charges was the basis for the motion—it did not specifically consider this as an argument for dismissal under CrR 8.3(b). Because the superior court did not base its decision on CrR 8.3(b), there is no decision for us to review.

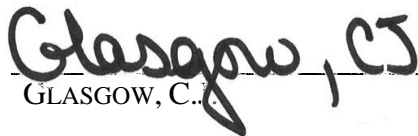
We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.



PRICE, J.

We concur:

  
GLASGOW, C.J.  
MAXA, J.

**LAW OFFICES OF LISE ELLNER**

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**Transmittal Information**

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