Snohomish County
Office of Public Defense
3000 Rockefeller Ave.
Everett, WA 98201

April 30, 2021

Justices of the Washington Supreme Court
P.O. Box 40929
Olympia, Washington 98504-0929
VIA E-MAIL: supreme@courts.wa.gov

RE: Proposed Changes to CrR 3.2 and CrRLJ 3.2

Dear Chief Justice Gonzalez and Associate Justices:

I write today in support for a modified CrR 3.2 and CrRLJ 3.2 (CrR/LJ 3.2) mandating the release of the accused on their personal recognizance in non-violent cases. I ask you to adopt the proposed amendment to CrR/LJ 3.2(a) and (a)(1) mandating release in all non-violent cases except when a defendant has failed to appear on the current charge. I ask you to not adopt the proposed CrR/LJ 3.2(a)(2) and (3) for the reasons outlined below.

The Court should support Judge Kessler's proposal to create mandatory release in non-violent cases. Even though our current version of CrR/LJ 3.2 envisions a presumption of release, in practice it results in routine detention of the accused in non-violent cases. The current rule encourages judges to engage in a speculative inquiry to determine the accused's future likelihood to not appear or to commit a violent offense. Foretelling a person's future has always been an affair fraught with risk, particularly for those whose future is under scrutiny. As we all know, when asked to speculate about a person we don't know, our biases can often convince us that someone with darker skin, who doesn't speak English, or who is exhibiting signs of a mental health issue are often seen as greater risks than people who look like and come from the same racial and socio-economic class as the judge. Statewide data makes clear that BIPOC persons are subject to higher bail and lengthier sentences than non-BIPOC defendants. National data is clear that pretrial detention is correlated with a greater likelihood to plead guilty. Mandating release in non-violent cases can assist in addressing some of the inherent biases that have allowed for the disproportionate pretrial detention of BIPOC, persons with disabilities, and indigent persons. The ability to be released pretrial can often mean the difference between guilt and innocence or prison sentence and a local sentence.[1]

I encourage you to not adopt proposed CrRLJ 3.2(a)(2) and (3). These sections would allow courts to continue to detain a person charged with a non-violent offense where the person is on pretrial release or is on probation/community custody. The court should decline to add these sections for three reasons: 1) there is no rational or causal relationship between a defendant's release or probation status on one case and their likelihood to appear in another; 2) the language of the rule excludes mandatory release for any person who has ever been subject to pretrial release regardless of their ability to appear, and; 3)

[1] https://www.heraldnet.com/news/one-crime-two-very-different-punishments-for-everett-teens/

section (a)(3) would exclude mandatory release even if the newly arraigned case predates a pending case for which the defendant is on community custody.

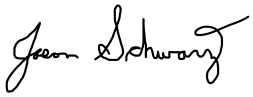
First, the proposed language of CrR/LJ 3.2(a)(2) provides that a person charged with a non-violent crime shall be released on personal recognizance unless "the accused has been released on personal recognizance or bail for an offense alleged to pre-date the current charge." There is no rational or causal relationship between a person being on pretrial release and the likelihood of that person to appear at a future court date. A person could violate a pretrial release condition and still appear at every court date. Similarly, a person could miss every court date and abide by every other pretrial release condition. The proposed section (a)(2) encourages a judge to make negative legal assumptions about the defendant's ability to appear that are not based in fact, but rather in the biases and beliefs of judges.

Second, the amendment would appear to permit a court to impose bail if a criminal defendant had ever been released on PR or bail for any prior offense without regard to whether the defendant was currently out on release at the time of commission of the new offense. This will result in extensive pretrial detentions on non-violent cases.

Third, the reference in section (a)(3) to "an offense alleged to pre-date" appears to envision simply reviewing the dates of violation of the two offenses which does not appear to have any relation to the stated intent of the amendment. The Honorable Ronald Kessler's comments suggest that the goal of this section was to identify whether a defendant was on some form of conditioned release at the time of the commission of the new offense. However, the proposed language does not capture this goal and instead seems to reduce the analysis to a question of whether another offense was committed first. The language of the rule would create an exception to mandatory release even if a person is arraigned on an offense where the date of violation predates the date of violation the other offense. Furthermore, there is no rational or causal relationship between a person's status on community custody and the person's likelihood to appear in court at a future date. As with section (a)(2), this section encourages a judge to make negative legal assumptions about the defendant's ability to appear that are not based in fact, but rather in the biases and assumptions about a person on probation or community custody.

Lastly, any rule should not preclude a defendant from being able to ask for nominal pretrial bail in order to accumulate credit for time served in jail. Persons charged with multiple offenses who are not in custody on all the cause numbers are subject to lengthier sentences when they do not get credit for time served because nominal bail was not imposed at the defendant's request.
I encourage the Justices to adopt the proposed rule to CrR/LJ 3.2(a)(1). I ask that you eliminate the proposed language of section (a)(2) and (3) as they have no rational relationship to a person's likelihood to appear in court at a future date and will only amplify the harmful effects of pretrial detention. These well-documented impacts of pretrial detention will disproportionately fall on indigent persons and BIPOC.

Regards,



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From: OFFICE RECEPTIONIST, CLERK
To: Linford, Tera
Subject: FW: Comment to Proposed CrR 3.2
Date: Friday, April 30, 2021 10:42:38 AM
Attachments: Comment to Proposed CrR 3.2 Amendment.pdf

From: Schwarz, Jason [mailto:Jason.Schwarz@co.snohomish.wa.us]
Sent: Friday, April 30, 2021 10:27 AM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Subject: Comment to Proposed CrR 3.2

Good morning,

Please accept the attached comments to the proposed amendment to CrR 3.2 and CrRLJ 3.2.

Thank you,

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